National Energy Board

Reasons for Decision

Altamont Gas Transmission Canada Limited

GHW-1-92

February 1993

Facilities

Preliminary Question of Jurisdiction

National Energy Board

Reasons for Decision

In the Matter of

Altamont Gas Transmission Canada Limited

Application dated 26 July 1991 for
Gas Transmission Pipeline Facilities

Preliminary Question of Jurisdiction

GHW-1-92

February 1993

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Abbreviations

Act	*National Energy Board Act*
Altamont Canada or the Company	Altamont Gas Transmission Canada Limited
Altamont (U.S.)	Altamont Gas Transmission Company
ANG	Alberta Natural Gas Company Ltd
1993/94 Annual Plan	NOVA Corporation of Alberta, Alberta Gas Transmission Division 1993/94 Annual Plan, dated June 1992
APMC	Alberta Petroleum Marketing Commission
Bcf	billion cubic feet
Board	National Energy Board
ERCB	Energy Resources Conservation Board
IGCAA	Industrial Gas Consumers Association of Alberta
Kern River	Kern River Gas Transmission Company
km	kilometre
Kootenay	Kootenay & Elk Railway Company
kPa	kilopascal
m^3	cubic metres
m^3/d	cubic metres per day
mm	millimetre
MMcfd	million cubic feet per day
MPa	megapascal
NPS	nominal pipe size (diameter), in inches
NOVA	NOVA Corporation of Alberta
psi	pounds per square inch
Roan	Roan Resources Ltd.
SDG&E	San Diego Gas & Electric Company
St. Clair	St. Clair Pipe Lines Ltd.
TransCanada PipeLines or TCPL	TransCanada PipeLines Limited
Union	Union Gas Limited

Recital and Submittors

IN THE MATTER OF the *National Energy Board Act* ("the Act") and the Regulations made thereunder; and

IN THE MATTER OF a preliminary question of jurisdiction raised by the Board in connection with an application dated 26 July 1991 by Altamont Gas Transmission Canada Limited, pursuant to section 58 of the Act, for an order granting exemption from the provisions of sections 30, 31, and 33 of the Act in respect of a proposed international gas transmission pipeline to be constructed in southern Alberta, filed with the Board under File 3400-A141-1; and

IN THE MATTER OF National Energy Board Directions on Procedure, Order GHW-1-92, as amended.

EXAMINED by means of written submissions.

BEFORE

R. Priddle	Presiding Member
J.-G. Fredette	Member
R.B. Horner, Q.C.	Member
A.B. Gilmour	Member
A. Côté-Verhaaf	Member
C. Bélanger	Member
R. Illing	Member
K.W. Vollman	Member
R.L. Andrew	Member

SUBMITTORS

Alberta Petroleum Marketing Commission
Altamont Gas Transmission Canada Limited and Altamont Gas Transmission Company
Amoco Canada Petroleum Company Ltd.
Industrial Gas Consumers Association of Alberta
Industrial Gas Users Association
Norcen Energy Resources Limited
San Diego Gas & Electric Company
Southern California Edison Company
TransGas Limited

Chapter 1

Background

1.1 The Application

On 26 July 1991, Altamont Gas Transmission Canada Limited ("Altamont Canada" or "the Company") applied to the National Energy Board ("the Board"), pursuant to section 58 of the *National Energy Board Act* ("the Act"), for an order granting exemption from the provisions of sections 30, 31, and 33 of the Act in respect of an international gas transmission pipeline that the Company proposes to construct in southern Alberta.

The applied-for facilities would consist of 300 m (980 feet) of 762 mm (30 inch) diameter line pipe with a valve at the upstream end, as depicted in Figure 1-1[1]. The estimated capital cost of the facilities is approximately $287,000. A more complete description of the applied-for facilities is contained in Chapter 2 of this Reasons for Decision.

In an information request letter dated 25 October 1991, the Board asked Altamont Canada for, *inter alia*, full particulars of the proposed facilities of NOVA Corporation of Alberta ("NOVA") required upstream of Wild Horse to the point of interconnection with the existing NOVA mainline. Those particulars are described in Chapter 2.

1.2 Raising of Preliminary Question of Jurisdiction

The Board advised Altamont Canada in a letter dated 15 April 1992 that it had concluded, based on the information filed by Altamont Canada regarding the proposed facilities of NOVA and their relationship with the applied-for facilities, that there was a question as to whether the application was properly before the Board under section 58 of the Act.[2]

Accordingly, pursuant to Rule 14 of the draft *NEB Rules of Practice and Procedure*, the Board directed in its letter that a preliminary question of jurisdiction be raised for its consideration. The question posed in the letter read as follows:

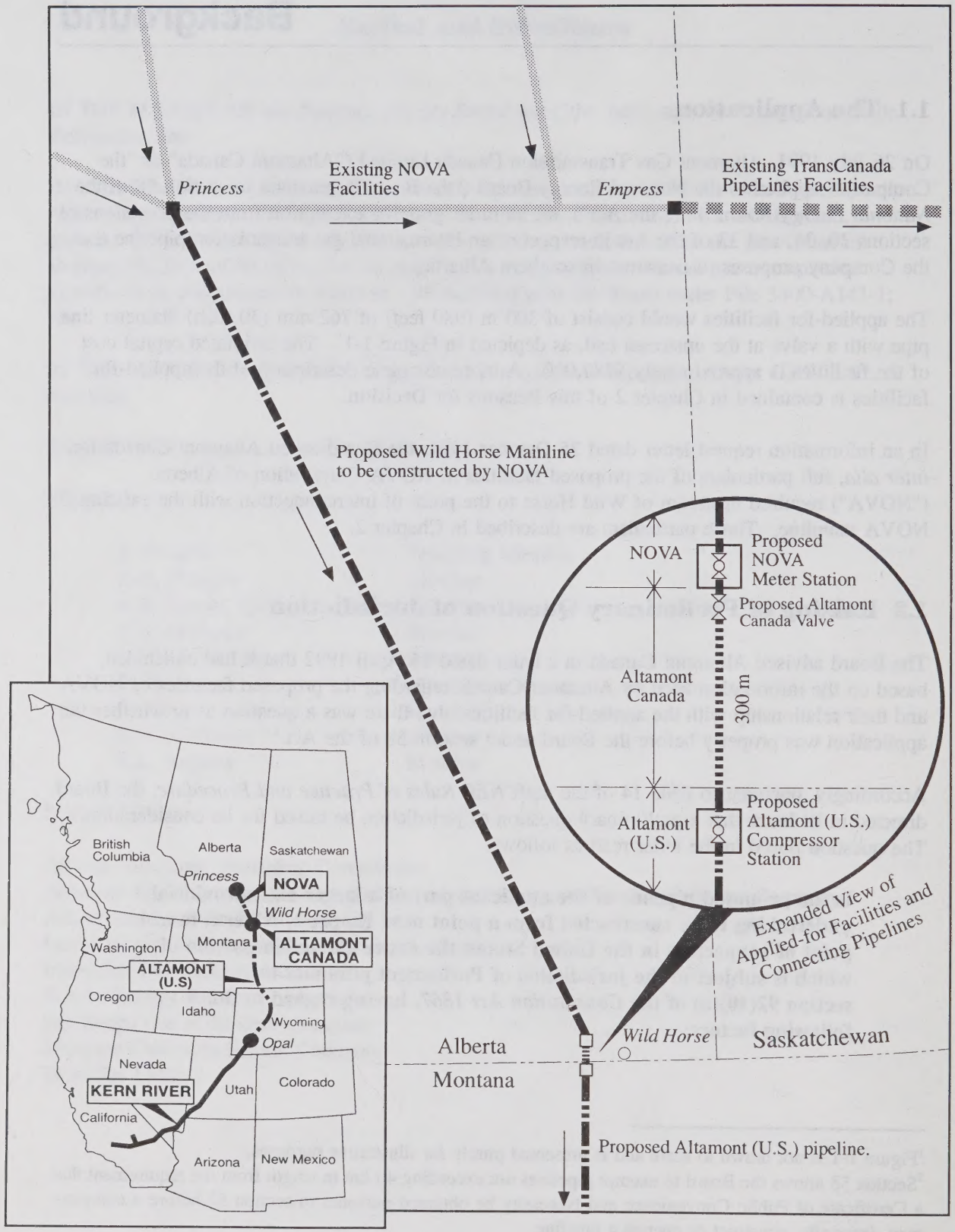
> **Is the proposed pipeline of the applicant part of a larger extraprovincial undertaking to be constructed from a point near Empress, Alberta to a point of connection in the United States, the entire Canadian portion of which is subject to the jurisdiction of Parliament pursuant to section 92(10)(a) of the *Constitution Act 1867*, having regard to the following factors:**

---

[1]Figure 1-1 is not drawn to scale and is presented purely for illustrative purposes.

[2]Section 58 allows the Board to exempt pipelines not exceeding 40 km in length from the requirement that a Certificate of Public Convenience and Necessity be obtained pursuant to section 52 before a company may, *inter alia*, construct or operate a pipeline.

Figure 1 - 1
Location of Applied - for Facilities
in Relation to Other Selected Pipelines



(a) **the physical connections between the pipelines of NOVA Corporation of Alberta ("NOVA"), Altamont Canada, and Altamont Gas Transmission Company;**

(b) **the operation of the NOVA and Altamont Canada pipelines as a line wholly or substantially dedicated to the export of a commodity from Canada; and**

(c) **the purposes to be served by the construction of the pipelines of NOVA and Altamont Canada.**

The Board also advised in its letter that it had decided to conduct a written proceeding to determine the preliminary question of jurisdiction and that it would be issuing Directions on Procedure for that purpose.

1.3 The GHW-1-92 Proceeding

On 25 June 1992, the Board issued Order GHW-1-92 setting out Directions on Procedure for the written hearing to be conducted into the preliminary question of jurisdiction. In brief, these Directions provided Altamont Canada and interested parties with an opportunity to make written submissions on the preliminary question.

The text of the preliminary question of jurisdiction appearing in Order GHW-1-92 varied from that shown above in that the word "work" was substituted for "undertaking" in the second line.

The Directions on Procedure, as initially framed, provided Altamont Canada and interested parties with a common deadline for making submissions. In a letter to the Board dated 13 July 1992, Altamont Canada requested that the filing schedule be adjusted in order to allow the Company to make its submission two weeks in advance of the deadline for interested party submissions, with a right of reply. The Board granted this request through Order AO-1-GHW-1-92 dated 22 July 1992.

Aside from adjusting the filing schedule, Order AO-1-GHW-1-92 also served to further revise the text of the preliminary question of jurisdiction to account for a change in location of NOVA's proposed upstream pipeline that had been brought to the Board's attention by Altamont Canada on 15 July 1992. On that date, Altamont Canada filed a revision to its 20 February 1992 response to the Board's 25 October 1991 information request. This disclosed that NOVA now planned to construct its proposed upstream pipeline, identified as the Wild Horse Mainline, from the area of Princess, Alberta rather than Empress, Alberta as had been originally indicated. This change of plans was confirmed in the NOVA, Alberta Gas Transmission Division 1993/94 Annual Plan dated June 1992 ("1993/94 Annual Plan"), a copy of which was also filed with the Board by Altamont Canada on 15 July 1992.

The preliminary question of jurisdiction was revised by substituting the name "Princess" for the name "Empress" in the second line. In its final form, therefore, the preliminary question of jurisdiction, as communicated to Altamont Canada and interested parties on 22 July 1992, read as follows:

Is the proposed pipeline of the applicant part of a larger extraprovincial work to be constructed from a point near Princess, Alberta to a point of connection in the United States, the entire Canadian portion of which is subject to the jurisdiction of Parliament pursuant to section 92(10)(a) of the *Constitution Act 1867*, having regard to the following factors:

(a) the physical connections between the pipelines of NOVA Corporation of Alberta, Altamont Gas Transmission Canada Limited, and Altamont Gas Transmission Company;

(b) the operation of the NOVA Corporation of Alberta and Altamont Gas Transmission Canada Limited pipelines as a line wholly or substantially dedicated to the export of a commodity from Canada; and

(c) the purposes to be served by the construction of the pipelines of NOVA Corporation of Alberta and Altamont Gas Transmission Canada Limited.

Altamont Canada filed a submission on the preliminary question of jurisdiction on 27 July 1992. The Company noted in its covering letter that Altamont Gas Transmission Company ("Altamont U.S.") was taking the same view of the matter as Altamont Canada and fully supported the Altamont Canada submission. Seven interested parties filed submissions by 13 August 1992 and Altamont Canada filed its reply submission on 20 August 1992.

On 15 September 1992, the Board forwarded a second information request letter to Altamont Canada asking for certain additional information on the proposed upstream Wild Horse Mainline. The Company's response to the information request was provided on 12 November 1992.

The Board subsequently determined that parties should be granted an opportunity to provide supplemental written submissions to the Board solely for the purpose of commenting upon the new facts disclosed by Altamont Canada in its 12 November 1992 response, which included new facts related to the potential for use by Alberta producers of the NOVA Wild Horse Mainline. The procedures governing the filing of supplemental submissions were set out in Order AO-2-GHW-1-92 dated 27 November 1992.

Altamont Canada filed its supplementary submission on 7 December 1992. Supplementary submissions from three interested parties followed on 18 December 1992, followed in turn by Altamont Canada's reply comments on 4 January 1993.

Description of Altamont Canada Project

This chapter presents a description of the Altamont Canada project based on the information filed with the Board in the Altamont Canada application and responses and in the context of the GHW-1-92 proceeding.

2.1 Design of Proposed Altamont Canada Facilities

As stated in section 1.1, the applied-for facilities would consist of 300 m of line pipe, as depicted in Figure 1-1.

The proposed pipeline is one link in a proposed pipeline system intended to export Canadian gas to markets in the U.S., principally in southern California. The capacity of the system would be 20.8 million cubic metres per day (736 MMcfd) commencing 1 November 1994.[1] The components of that system are the pipelines of NOVA, Altamont Canada, Altamont (U.S.) and Kern River Gas Transmission Company ("Kern River").

Altamont Canada indicated in its application that its proposed pipeline would be interconnected, at its upstream end, with a proposed NOVA meter station and adjoining pipeline. Downstream at the Alberta/Montana border near Wild Horse, Alberta, the proposed Altamont Canada line would connect with a matching 762 mm (30 inch) diameter pipeline 998 km (620 miles) in length proposed by Altamont (U.S.). The Altamont (U.S.) pipeline would connect, near Opal, Wyoming, with the existing pipeline of Kern River leading into California.

Altamont Canada advised the Board in its application that its pipeline facilities would be designed for a maximum operating pressure of 9930 kPa (1440 psi). The steel pipe specification would be 762 mm (30 inch) diameter, 9.8 mm (0.386 inch) wall thickness, Grade 483 MPa (70,000 psi), Category II.

Altamont Canada does not plan to own any compression or metering facilities. The proposed Altamont (U.S.) pipeline system would include six compressor stations and metering facilities.

Altamont Canada also noted in its application that its proposed facilities would be designed, constructed, and operated in accordance with the Board's *Onshore Pipeline Regulations* and all other applicable codes and guidelines, including CAN/CSA-Z184-M86 "Gas Pipeline Systems" and the CAN/CSA-Z245 series of material standards.

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[1] 1 November 1993 was the in-service date shown in the initial application. As indicated in subsequent filings with the Board, the anticipated in-service date is now 1 November 1994.

2.2 Design of NOVA's Proposed Wild Horse Mainline

NOVA's proposed Wild Horse Mainline would extend from a point of interconnection with NOVA's existing pipeline system in the area of Princess, Alberta (LSD 12-18-20-11 W4M) to a point of interconnection with Altamont Canada's proposed pipeline near Wild Horse, Alberta (LSD 05-05-01-02 W4M), a distance of approximately 217 km (135 miles). The proposed NOVA Wild Horse Mainline would follow a southeasterly route, as shown on Figure 1-1.

The Wild Horse Mainline would be designed to a maximum operating pressure of 6450 kPa (935 psi). The steel pipe specification is planned to be 1067 mm (42 inch) diameter, 9.0 mm (0.354 inch) wall thickness, Grade 483 MPa (70,000 psi), Category II. Altamont Canada further indicated to the Board that the Wild Horse Mainline would meet all applicable requirements of the CAN/CSA-Z184 and CAN/CSA-Z245.1 standards.

The compression for the gas to be transported on the proposed Wild Horse Mainline would be provided upstream on NOVA's existing pipeline system.

NOVA's design also contemplates the installation of a meter station, to be known as the Wild Horse Meter Station, at the downstream end of the Wild Horse Mainline at the point of interconnection with Altamont Canada's proposed facilities.

Block valves would be installed at approximately 30 km (19 mile) intervals along the proposed route of the Wild Horse Mainline.

2.3 Gas Metering and Custody Transfer

Custody transfer of gas would take place at the point of interconnection between NOVA and Altamont Canada immediately downstream of NOVA's proposed Wild Horse Meter Station.

As noted earlier, Altamont Canada does not plan to install any metering facilities. There would, however, be metering facilities owned by Altamont (U.S.) south of the international border.

2.4 Function of NOVA's Proposed Wild Horse Mainline

In its 15 September 1992 information request letter to Altamont Canada, the Board asked for, *inter alia*, "details of the intended uses of NOVA's proposed Wild Horse Mainline, including a listing of all proposed receipt and delivery points and associated flowrates".

In its 12 November 1992 response, Altamont Canada stated that "the information filed confirms that NOVA's proposed Wild Horse Mainline will be fully integrated with NOVA's existing intra-Alberta pipeline system with the potential of serving intra-Alberta markets." Altamont Canada further stated that "the intended initial use of the NPS 42 Wild Horse Mainline is for the transportation of gas NOVA has contractually agreed to receive into its system from certain shippers, and to deliver gas NOVA has contractually agreed to deliver within Alberta to such shippers, at the outlet of a meter station to be constructed by NOVA at

the interconnection of the NOVA system with the pipeline system to be owned by Altamont Canada".

Altamont Canada went on to state that "historically there has been a time lag between the construction of a major pipeline into any area and the connection of new gas supply to that pipeline". The Company noted that "the deadline for receipt requests for new connecting facilities, the volume for which will be included in the 1994/95 design, was August 4, 1992", and went on to state that "as the construction of the NPS 42 Wild Horse Pipeline has been delayed NOVA would anticipate requests for new receipt service to be connected to the Wild Horse Mainline would be made prior to August of 1993 and be in service for November 1, 1995". Altamont Canada concludes that "it would, therefore, be consistent with past experience to expect both new deliveries to Alberta commercial and other local markets and the development of new reserves in the area".

Finally, Altamont Canada included in its response a copy of a letter from Roan Resources Ltd. ("Roan") to NOVA dated 11 November 1992 providing what the Company described as "additional information as to the gas supplies in southeastern Alberta which would benefit from the construction by NOVA of the Wild Horse Mainline". In its letter, Roan estimated the shut-in reserves along the Wild Horse Mainline corridor which might be connectable to the line to be in excess of 100 Bcf ($2.8\ 10^9 m^3$). Roan also expressed an interest in having a receipt point placed along the Wild Horse Mainline, but stopped short of making a formal request "due to the uncertainties surrounding the current National Energy Board inquiries about jurisdiction".

2.5 Scheduled In-Service Dates and Status of NOVA's Proposed Wild Horse Mainline

In its application, Altamont Canada indicated that the construction of its proposed pipeline facilities would take place in the summer of 1993 in conjunction with an expansion of the NOVA system, later clarified to include the proposed Wild Horse Mainline.

The scheduled in-service date for the Altamont Canada facilities was identified in the application as 1 November 1993. NOVA's 1993/94 Annual Plan indicated that the same in-service date was being targeted for the proposed Wild Horse Mainline.

On 31 July 1992, the Alberta Petroleum Marketing Commission ("APMC") provided the Board with a copy of a letter from NOVA to the Alberta Energy Resources Conservation Board, also dated 31 July 1992, indicating that Altamont Canada had recently advised NOVA that gas deliveries at Wild Horse would not be required to commence on 1 November 1993. The letter further indicated that, for that reason, NOVA had withdrawn the Altamont-related NOVA facilities from its 1993/94 Annual Plan.

In a letter to the Board dated 5 August 1992, Altamont Canada confirmed that the scheduled in-service date for its proposed pipeline facilities had in fact been delayed by 12 months to 1 November 1994.

In a letter to the Board dated 12 November 1992, Altamont Canada clarified that it had written a letter to NOVA on 24 July 1992 requesting that NOVA cease all work then in progress with

respect to the Wild Horse Mainline. More specifically, Altamont Canada requested that NOVA delay its planning, procurement and construction by one year. Altamont Canada also noted that, by letter dated 30 July 1992, NOVA agreed to the Company's request subject to the Company executing amendments to certain project agreements. This action was subsequently taken.

In order to accomplish an in-service date of 1 November 1994 for the Wild Horse Mainline, Altamont Canada would have to notify NOVA by 1 April 1993 of its intention to proceed towards that in-service date.

Altamont Canada and NOVA are working towards a common in-service date. Altamont Canada stated in its application that construction of its proposed facilities would take place in conjunction with the construction of the related facilities to be constructed by NOVA.

2.6 Coordination of Operation Among NOVA, Altamont Canada, and Altamont (U.S.)

In its 25 October 1991 information request letter to Altamont Canada, the Board asked for, *inter alia*, details of any agreement(s) entered into by Altamont Canada with NOVA or Altamont (U.S.) for the operation and maintenance of the proposed Altamont Canada facilities.

In its 20 February 1992 response, Altamont Canada indicated that no such agreement had been entered into by the Company with NOVA and that its facilities would be operated independently of the NOVA system. Altamont Canada went on to state that it would, in practice, operate as part of the overall Altamont system in the same way that the extensions of the Alberta Natural Gas Company Ltd, TransCanada PipeLines Limited ("TransCanada PipeLines"), and Westcoast Energy Inc. systems into Alberta to connect with NOVA are operated as part of those systems.

Altamont Canada went on to state that "co-ordination of pipeline design, construction, and operation between the NOVA and Altamont systems will be in accordance with established practices in the industry where upstream and downstream pipelines interconnect to permit the flow of gas from the field to the market". The Company further noted that a common operator for the Altamont Canada and Altamont (U.S.) pipelines was contemplated in the name of Altamont Service Corporation, a wholly-owned subsidiary of Tenneco Gas.

2.7 Volume and Composition of Gas to be Transported

Altamont Canada indicated, in its application, that the maximum capacity of its pipeline would be 20.8 $10^3m^3/d$ (736 MMcfd) under summer conditions, assuming a flowing gas temperature of 15.6°C (60°F) and a gas gravity of 0.577.

In its 12 November 1992 response to the Board's 15 September 1992 information request, Altamont Canada advised, *inter alia*, that NOVA's proposed Wild Horse Mainline has been designed to deliver natural gas from areas that have historically produced lean gas. Altamont Canada further reported that NOVA expects the composition of the natural gas delivered to the Company to be similar, under normal operating conditions, to the composition of the gas

exiting the Empress Straddle Plants. This production would be sourced from the North/East and Medicine Hat laterals on the NOVA system.

2.8 Transportation Service Contracts

As part of its 20 February 1992 response to the Board's 25 October 1991 information request, Altamont Canada advised the Board that shippers on its pipeline would contract with NOVA for transportation within Alberta to the point of interconnection between NOVA and Altamont Canada. The individual shippers would also contract with Altamont (U.S.) for transportation in the United States from the international border. With respect to the Altamont Canada link, Altamont (U.S.) would contract with Altamont Canada for transportation of volumes on behalf of the Altamont (U.S.) shippers.

Submissions

A number of submissions were received from interested parties in response to the Board's preliminary question of jurisdiction. Supplementary submissions were filed at the Board's request after the response of Altamont Canada to the information request of the Board dated 15 September 1992. These submissions are summarized as follows.

3.1 Altamont Gas Transmission Canada Limited

Mr. Schultz, counsel for Altamont Canada, filed on 27 July 1992 a comprehensive and detailed brief with the Board explaining the position of the Company that the Board has jurisdiction to consider its application under section 58 of the Act. He notes that Altamont (U.S.) fully supports the submission of Altamont Canada.

In the brief, Mr. Schultz discusses the early history of pipeline regulation in Canada and discusses what he concludes to be the "rule of restraint which has governed the exercise of federal jurisdiction over natural gas pipelines". In this regard, he makes reference to the decision of the Board of Transport Commissioners in the TransCanada PipeLines case[1] and to the views of the *Royal Commission on Energy, First Report,* (October 1958)[2] (known as the "*Borden Royal Commission Report*"). The brief also refers to possible political understandings about jurisdiction reached in the 1950's.

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[1]The Board of Commissioners authorized the construction of the TransCanada PipeLines pipeline from a point of commencement just west of the Alberta/Saskatchewan border. An earlier application, which was not considered by the Board, included gas gathering and transmission lines in Alberta.

[2]Counsel referred specifically to paragraph 31 in Chapter 2 of the *Borden Royal Commission Report* which states as follows:

> "31. The Commission is not unmindful that in regulating interprovincial gas and oil pipe line companies questions with respect to the jurisdiction of the Parliament of Canada *vis-à-vis* the jurisdiction of the respective provincial legislatures may arise.
>
> So long as the provinces of Canada concerned have made provision for proper measures of conservation and orderly production within their respective boundaries, and administer them on a sound basis, the Commission believes that it should be possible for the Parliament of Canada, through the Board of Transport Commissioners, to limit the exercise of its jurisdiction over gas and oil pipe lines so that it will not extend into fields which can adequately be dealt with by provincial regulation and control. Specifically, the Commission does not believe that the Board of Transport Commissioners need exercise jurisdiction over gathering systems connected to interprovincial systems. However, we realize that, if such jurisdiction rightly belongs to the Parliament of Canada, it may in the future be necessary for the Board to exercise it in order to ensure that its regulatory authority will be effective. The important consideration is that if the consumer of oil or gas in Canada is to receive the benefit of a reasonable price, field prices in the respective provinces and transmission charges must remain reasonable.
>
> Certain of the provinces of Canada have already enacted legislation and established administrative machinery dealing with conservation and production. So long as provincial legislation and administrative machinery does not impede the effectiveness of the regulatory authority of the Parliament of Canada over interprovincial and international oil and gas pipe line companies the Commission believes that the exercise of the jurisdiction of the Parliament of Canada can be limited accordingly."

In a further chapter, counsel discusses relevant principles of constitutional jurisdiction and cites the Supreme Court of Canada decision in *Northern Telecom Canada Limited et al v. Communication Workers of Canada*[1] (the "*Northern Telecom* case"), in support of his assertion that federal jurisdiction is founded upon an exception. Counsel argues that this case is authority for the proposition that a party claiming federal jurisdiction bears the onus of proving federal jurisdiction.

Counsel for Altamont Canada submits that mere physical interconnection between a local work and an extraprovincial work will not of itself ground federal jurisdiction, nor will a mutually beneficial commercial arrangement be sufficient. Counsel also states that works do not exist in isolation but rather depend upon the character of the undertaking in which they are used. For that proposition he relies upon *Township of Flamborough v. NEB et al* [2].

The salient points of Altamont Canada's submission in support of provincial jurisdiction over the Wild Horse Mainline are as follows:

- The Wild Horse Mainline will be fully integrated with NOVA's existing intra-Alberta pipeline system and will interconnect with existing NOVA laterals in the Medicine Hat area for integrated operation with the NOVA system. Therefore, the Wild Horse Mainline is an extension, no different in character from other lines of NOVA, of NOVA's intraprovincial pipeline system.

- Nothing exists to distinguish the Altamont Canada line from other federally regulated pipelines which connect with NOVA.

- Physical connection of pipelines is not determinative of constitutional classification and functional integration is essential for any proper determination of a federal classification.

- NOVA exists as an instrument of public policy in Alberta in relation to the control of the province's natural resources and it is a fundamental error to view jurisdiction solely in the context of section 92(10)(a) of the *Constitution Act 1867.*

- The action of the Board in striking a preliminary question of jurisdiction is fundamentally unfair in that it departs from the long-established practice of the Board and singles out the Altamont Canada application as a test case.

Counsel for Altamont Canada closes his submission by arguing that:

> Constitutional interpretation is not a lifeless, mechanistic activity. The particular words and phrases of one part of the *Constitution Acts 1867 - 1982* must be interpreted in light of

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[1][1983] 1 S.C.R. 733 at p. 779
[2](1985), 55 N.R. 95 (F.C.A.); 58 N.R. 79 (S.C.C.) (leave to appeal denied)

> the balance of federal and provincial powers which the Constitution seeks to achieve. To do otherwise would destroy the constitutional balance since virtually anything could be said to touch upon matters of federal jurisdiction.

In Altamont Canada's reply dated 20 August 1992, counsel for Altamont submits:

- No party has argued that the question raised by the Board should be answered in the affirmative.
- No party has disputed the facts presented by Altamont Canada.
- The onus is on the one who seeks to invoke section 92(10)(a) of the *Constitution Act, 1867* to establish the necessary constitutional facts. Failing such a demonstration, exclusive provincial competence governs. This is because provincial jurisdiction is the rule and federal jurisdiction is the exception.
- The facts demonstrate that the proposed Altamont Canada pipeline will be part of an extra-provincial pipeline, namely, the Altamont Project, and the proposed NOVA Wild Horse Mainline will be part of an intra-provincial pipeline, namely, the NOVA system.
- The position of Southern California Edison Company[1] is without support in law.

In its supplementary submission dated 7 December 1992, Altamont Canada states that it has no further argument and that:

> The facts disclosed in the latest responses to the Board's information requests confirm and are entirely consistent with Altamont Canada's position as already put before the Board.

Lastly, in a letter dated 4 January 1993, counsel for Altamont Canada states that:

> Altamont Canada has no reply submissions. No case has been made for the extension of federal jurisdiction to NOVA's proposed Wild Horse Mainline. There is nothing to which to reply.

3.2 Alberta Petroleum Marketing Commission

The APMC also submitted a comprehensive brief through its counsel, Ms. Moreland, which discusses fact, policy and law in the context of the preliminary question of jurisdiction. On the subject of jurisdiction, the APMC cites *United Transportation Union et al v. Central*

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[1]As set out at p. 14.

Western Railway Corporation[1] (the "*Central Western* case"), particularly as it relates to the integral test for the determination of constitutional classification. The APMC commends to the Board the approach of the Supreme Court in *Central Western*, and submits that the Wild Horse Mainline would perform a function unlike that performed by the Altamont Canada line because:

> The Lateral [Wild Horse Mainline] would receive and deliver natural gas within the province of Alberta, and will form a part of the integrated NOVA pipeline system, while Altamont Canada facilities will simply receive gas for transport to the international border for ultimate delivery to Altamont and Kern River.

The APMC brief refers to *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications*[2] (the "*AGT* case"), a decision in which the Supreme Court of Canada held the Alberta telephone company to be subject to federal jurisdiction, but distinguishes it on the ground that, factually, telecommunications provides a poor analogy to pipeline or railway works and undertakings. The APMC also states:

> ...the Lateral [sic] is clearly a local work comprising a part of the local NOVA undertaking. It will form part of the NOVA integrated gathering and distribution system, has the potential for intraprovincial uses and is wholly situated within the province of Alberta. It shares no common ownership with the Altamont Canada system, and the operation and control of the Altamont Canada and NOVA systems is distinct except for the co-ordination between pipelines that is common to all natural gas pipelines and is necessary to effect efficient deliveries from one system to another.

In its supplementary submission, the APMC states that the facts disclosed by Altamont Canada, in its response to the Board's information request of 15 September 1992, support the APMC position as set out in its initial filing. In the APMC's submission, the purpose of the Wild Horse Mainline is no different than the purpose served by other NOVA facilities. The APMC states that the preliminary question should be answered in the negative.

3.3 Industrial Gas Consumers Association of Alberta

The Industrial Gas Consumers Association of Alberta ("IGCAA") filed a brief through its counsel, Mr. Ward, which supports the position of Altamont Canada on the preliminary question of jurisdiction. In conclusion, the IGCAA submits that:

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[1][1990] 3 S.C.R. 1112
[2][1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385

(a) The [Altamont Canada line] is part of a "work...extending beyond the limits of the province", is a "pipeline" as defined in the Act and is therefore subject to the jurisdiction of the Board;

(b) the existing and proposed facilities of NOVA upstream of the [Altamont Canada line] are distinct from the "work", form part of a "local work and undertaking" as referenced in section 92(10)(a) of the *Constitution Act 1967* [*sic*] which is totally within the Province of Alberta and such facilities are therefore subject to the jurisdiction of such Province and outside of the jurisdiction of Parliament.

3.4 Amoco Canada Petroleum Company Ltd.

Amoco Canada Petroleum Company Ltd. filed a letter which advises the Board that it fully supports the Altamont Canada submission.

3.5 TransGas Limited

TransGas Limited made the following comments in its letter supporting the Altamont Canada submission:

> The proposed Wild Horse Mainline is an extension of Nova's existing intra-provincial pipeline system and, therefore, is not distinguishable from any other Nova lines within the province of Alberta. The Wild Horse Mainline will be an integral part of the Nova intra-provincial pipeline system. As a result, pursuant to the content of s. 2 of The National Energy Board Act, we submit that the proposed Mainline would not fall under federal jurisdiction.

3.6 Other submissions

The Industrial Gas Users Association filed a letter in which it states that it will not submit any comments with respect to the jurisdictional issue. Similarly, Norcen Energy Resources Limited and San Diego Gas and Electric Company filed letters expressing no comments on the jurisdictional issue.

Finally, Southern California Edison Company, through its counsel, Mr. Keough, filed a submission in which it submits that Altamont Canada's submission deals with matters beyond the scope of these proceedings, and states:

> In Edison's view Altamont Canada's submission is totally inappropriate in the context of these proceedings, as Interested Parties have gauged their participation based on the Board's

direction and not on the way Altamont Canada would like these proceedings to be conducted. Edison requests that the Board explicitly rule that the matters raised in Altamont Canada's submission, which go beyond the scope of the question originally posed by the Board, be struck from the record of these proceedings. Likewise, should any Interested Party respond to Altamont's wide ranging submission, the irrelevant parts of such submissions should also be struck from the record. Finally, Edison requests that the Board direct Altamont to confine its reply comments to the narrow jurisdictional questions as posed by the Board in its Hearing Order.

Views of the Board

4.1 The Issue

The issue which the Board must decide as a preliminary matter before considering the application by Altamont Canada is the appropriate constitutional classification of a pipeline that, when built, will extend approximately 217 km from Princess in the province of Alberta to the international boundary with the United States of America. Altamont Canada has applied to the Board for an exemption under paragraph 58(1)(a) of the *National Energy Board Act* from certain provisions of the Act, in order to construct a 300 m pipeline (the "Altamont Canada line") extending from the international boundary to a point of connection with another line which is to be constructed from Princess, Alberta by NOVA (the "Wild Horse Mainline"). The crux of the issue embodied in the preliminary question of jurisdiction struck by the Board is whether the Altamont Canada line can be made the subject of an exemption order under paragraph 58(1)(a) of the Act or whether it must, together with the Wild Horse Mainline, form part of an application under section 52, in that these proposed lines are, in effect, one federal work connecting the province of Alberta and the United States of America.

Paragraph 58(1)(a) of the Act provides that:

> **58.**(1) The Board may make orders exempting
>
> (a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length...
>
> from any or all of the provisions of sections 29 to 33 and 47.

4.2 The Constitutional Tests

The federal power over pipelines is to be found in the exceptions to the provincial powers enumerated in section 92(10)(a) of the *Constitution Act, 1867*. The matters so excepted are subject to federal jurisdiction pursuant to section 91(29) of the *Constitution Act, 1867*. Thus, the federal government holds the exclusive power to make laws in relation to:

> Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

Pipelines, although not specifically mentioned in section 92(10)(a), have been held to be included in the phrase "other works and undertakings".[1]

In assessing the position of a particular work or undertaking within the constitutional framework, the words of Chief Justice Dickson in the recent *Central Western Railway* case [at pp.1124-1125] are instructive:

> There are two ways in which Central Western may be found to fall within federal jurisdiction ...First, it may be seen as an interprovincial railway and therefore come under section 92(10)(a) as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under section 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.

He also suggested [at p.1119] that "[i]n order to answer the jurisdictional question, the physical and operational character of the railway must be examined." The approach taken by Dickson, C.J., based on the jurisprudence to date, is that constitutional classification is determined on the basis of two tests. The first may be termed the "physical connection test" and the second the "vital, integral or essential test".

With respect to the physical connection test, the Board will clearly acquire jurisdiction over a pipeline if it connects one province with another or connects a province with a foreign country. However, a mere physical connection of an ostensibly provincial line with a federal line may not be sufficient to bring both lines under federal jurisdiction. In the *Central Western* case, Dickson, C.J. considered this latter point in the context of railway lines, stating [at p.1129] that:

> Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act 1867*. Furthermore, if the physical connection between the rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in

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[1] *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481 (S.C.C.), [1953] 3 D.L.R. 594 (B.C.C.A.)

nature: most rail lines located within a province do connect eventually with interprovincial lines.[1]

Counsel for Altamont Canada has referred to the case of *Kootenay and Elk Railway Company v. Burlington Northern Inc.* [2] (the "*Kootenay and Elk* case") in support of the proposition that a province may authorize the construction of a work which is wholly located within the borders of that province. Although a province may have the authority to authorize the construction of a work wholly situated within its borders, this does not end the matter. Federal jurisdiction may nevertheless result if the provincial work is vital, integral or essential to a federal work or undertaking as this test has been developed in the jurisprudence concerning section 92(10)(a) of the *Constitution Act, 1867.* This is essentially a factual determination.[3]

As previously stated, the physical and operational character of the pipeline must be examined.[4] A clear example of an integral connection is where the federal work controls the operations of the provincial work. In *Luscar Collieries Ltd. v. McDonald* [5] (the "*Luscar* case"), the Judicial Committee of the Privy Council found that a provincially-authorized railway located entirely within the borders of a province would come under federal authority if a railway subject to federal jurisdiction assumed operational control over it pursuant to an operating agreement. In this way, the provincial line could be considered to be part of a continuous system of railways operated together.

In *Reference Re National Energy Board Act* [6] (the "*Cyanamid* case"), the Federal Court of Appeal considered the issue of control in the context of a pipeline and found that, despite the physical connection of a proposed, ostensibly provincial pipeline owned by Cyanamid Canada Limited to the existing federal pipeline of TransCanada PipeLines, the very limited control that would be exercised by TransCanada PipeLines over the proposed pipeline negated a finding that the latter would also be subject to federal jurisdiction. The key distinction in that case was that the proposed pipeline was not necessary for the operation of TransCanada PipeLines, the interprovincial transmission company. MacGuigan, J.A. [at p. 610] suggested, however, that if TransCanada PipeLines had an agreement to operate the proposed pipeline, it would then fall within federal jurisdiction on the basis of the *Luscar* case.

The Courts have also considered whether a logical nexus exists between a federal work or undertaking and an ostensibly provincial work or undertaking. In *Construction Montcalm Inc.*

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[1]see also *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333 (P.C.); *B.C. Electric Railway Company v. Canadian National Railways*, [1932] S.C.R. 161; (1932), 2 D.L.R. 728 (sub. nom. *North Fraser Harbour Commissioners v. B.C. Electric Railway Company* 39 C.R.C. 215); *United Transportation Union v. Central Western Railway Corp.* (1990), 119 N.R. 1 (S.C.C.).

[2][1974] S.C.R. 955

[3]Dickson, C.J. in *A.G.T.* at W.W.R. p. 410. See also Mahoney, J.A. in *Dome Petroleum Ltd. v. National Energy Board* (1987), 73 N.R. 135 at p. 138.

[4]Dickson, C.J. in *Central Western Railway* case, at p. 1119.

[5][1927] 4 D.L.R. 85

[6](1987), 48 D.L.R. (4th) 596

v. Commission du Salaire Minimum[1], Mr. Justice Beetz provided guidance on analyzing the activities of a work or undertaking when he stated [at p. 769] that:

> The question whether an undertaking, service or business is a federal one depends on the nature of its operation. ...[I]n order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

On this basis, an analysis of the nature or operation or "purpose" of the work or undertaking is appropriate. Ownership, however, is not determinative but the effect that ownership or a change in ownership would have on the operation of the line can be a significant consideration.[2]

In the *AGT* case, the Supreme Court of Canada found federal jurisdiction over a telephone company owned by a provincial Crown. The facts had disclosed that the telephone company, which had initially operated as an intraprovincial work or undertaking, had changed over time. The company now held itself out to provide, and did in fact provide, telecommunications services not only within the borders of a single province but also beyond those borders and even beyond the Canadian border. Chief Justice Dickson stated that "... AGT *itself* is operating an interprovincial undertaking and that it does so primarily through bilateral contracts, its role in Telecom Canada and the physical interconnection of its system at the borders of Alberta."[3]

Furthermore, in the *Central Western* case, Dickson C.J. stated that, "if work occurs simultaneously between two enterprises, functional integration may exist". He found, however, that functional integration did not exist in that case because interaction between Central Western and Canadian National Railway occurred only sporadically (i.e. when the interchange of cars was necessary) and he found that "[t]he transfer can thus be seen as a connection at the end of the local transportation process."[4] He also found that the Central Western Railway was not vital or essential to the operations of Canadian National Railway in that "the effective performance of CNR's obligation as a national railway is not contingent upon the services of the appellant" and he stated that, "[t]hese factors point strongly, almost decisively, against a finding of federal jurisdiction over the employees."

The constitutional classification of a pipeline will, therefore, be determined on the basis of a consideration of the particular constitutional facts concerning that pipeline as related to physical connection, effect of ownership, control, and general operational and functional integration.

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[1][1979] 1 S.C.R. 754; 25 N.R. 1. See also: *Northern Telecom Ltd. v. Communications Workers of Canada et al (No. 1)*, [1980] 1 S.C.R. 115; *Northern Telecom Canada Ltd. et al v. Communication Workers of Canada et al (No. 2)* (1983), 147 D.L.R. (3d) 1 (S.C.C.)

[2]Dickson, C.J. in *Central Western* at p. 1131.

[3]*AGT* case, at p. 414

[4]*Central Western* case, at p. 1141

4.3 The Tests Applied to the Altamont Canada Line/NOVA Wild Horse Mainline

In striking its preliminary question of jurisdiction, the Board has been aware that a difference exists between a work and an undertaking, as that phrase is used in section 92(10)(a) of the *Constitution Act 1867*. A work is a physical thing[1] while an undertaking is considered to be an arrangement by which physical things are used[2]. The following discussion will examine the constitutional classification of the physical "work" comprising the Altamont Canada/NOVA lines in the context of the tests which have been established by the Courts.

4.3.1 Application of the Physical Connection Test

No submittor to these proceedings has raised an issue concerning the constitutional classification of the Altamont Canada line. That line satisfies the first test articulated by the Chief Justice in the *Central Western* case, in that it connects a province of Canada with the United States of America.

The proposed Wild Horse Mainline appears to be in a different category. That line will be built by NOVA from point to point entirely within the province of Alberta. Altamont Canada relies upon the *Kootenay and Elk* case as authority for the proposition that the province has authority to authorize the construction of a pipeline wholly situate within its boundaries. In the *Kootenay and Elk* case, the proposed rail line was to be constructed to a point one-quarter of an inch north of the international boundary with the United States of America and thus could be viewed, in a very strict sense, as being confined solely within the territory of the province of British Columbia. The decision of the majority dealt solely with the ability of the province to incorporate a company to construct the railway line. It did not deal with the operation of the Kootenay line once it was connected with a federal work crossing the international boundary, other than to suggest that the entire railway, at that point, would be characterized as federal.[3] The Board views this decision, on its narrow findings, as distinguishable from the facts in the subject application. In the present situation, it is proposed that the construction of both the NOVA and Altamont Canada portions of the line will be co-ordinated. Thus, one complete pipeline spanning the distance between Princess, Alberta, and the territory of the United States of America will be constructed.

It is the Board's view that the work to be constructed between Princess, Alberta, and the United States, as presently contemplated, would be subject to federal jurisdiction because it would constitute one work connecting the province of Alberta and the United States of America.

An analysis of the manner in which the two lines will operate upon commencement of deliveries provides additional support for a finding of federal jurisdiction over the entire line. The Altamont Canada line cannot be physically operated without the Wild Horse Mainline. All of the supply of natural gas to the Altamont Canada line will originate on the NOVA Wild

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[1] *Montreal v. Montreal Street Railway*, [1912] A.C. 333 at p. 342
[2] *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at p. 315
[3] *Kootenay and Elk* case, at p. 982

Horse Mainline. There will be no separate injection facilities to load gas into the Altamont Canada line. In addition, facilities to measure the flow of gas will not be installed on the Altamont Canada line but will be installed on the NOVA Wild Horse Mainline upstream of the interconnection with the Altamont Canada line.

Thus, in the view of the Board, the NOVA Wild Horse Mainline and the Altamont Canada line satisfy the first test set out by the Courts; that is, the entire line from Princess is *itself* a work connecting the province of Alberta with the United States of America and, accordingly, a federal work for purposes of the *Constitution Act, 1867.*

4.3.2 Application of the Vital, Integral or Essential Test

Even if the Board is incorrect in its view that the entire line from Princess to the international border is itself one work connecting the province of Alberta with the United States of America, an analysis of the facts before the Board shows that the Wild Horse Mainline is so closely connected with, or so essential to, the Altamont Canada line as to cause the proposed NOVA Wild Horse Mainline to lose its characteristics as a provincial work and become, together with the Altamont Canada line, one pipeline subject to federal jurisdiction. The Board made this finding notwithstanding the potential for use of the NOVA Wild Horse Mainline by an Alberta producer for purposes other than export and the separate ownership of, and separate transportation contracts for, the two lines.

The Board has considered the evidence submitted by Altamont Canada, in response to the Board's final information request, concerning the possibility that Roan may, in the future, seek to transport gas from receipt points on the NOVA Wild Horse Mainline. In this context, it should be noted that this producer has merely expressed an interest in using, but has not committed itself to use, the Wild Horse Mainline, once it is constructed.

The evidence before this Board is that the NOVA Wild Horse Mainline will initially provide delivery service exclusively to the Altamont Canada line with its only receipt point at Princess. In the case of *Attorney General of Ontario et al v. Winner*[1], the Privy Council expressed the view that the courts must focus on the undertaking which is in fact being carried on. Given the views of the Privy Council, and the inchoate nature of the evidence relating to the potential use by other shippers of the Wild Horse Mainline, it is the Board's view that insufficient evidence exists to warrant a finding that the Wild Horse Mainline will carry any volumes of intraprovincial natural gas.

Even were the Company able to convince the Board that the NOVA Wild Horse Mainline will immediately provide service to other producers in the area, the overall purpose of the line must be considered. Clearly, the purpose of the line from Princess to the international boundary is to transport natural gas from Alberta to United States markets on a continuous and regular basis. Any deliveries along the line, such as those suggested for Roan, would be, in the Board's view, an exceptional factor.

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[1][1954] A.C. 541 at p. 581

Altamont Canada and the APMC cite the *Central Western* case as supporting a conclusion that the NOVA Wild Horse Mainline is merely a local work or undertaking. In the Board's opinion, the facts disclosed serve to distinguish clearly the present case from the facts relied upon by the Supreme Court in the *Central Western* case. In that case, the short line railway possessed its own means of locomotion, loading facilities, operational management and employees. Central Western possessed the means to provide service to and from points located on its own line as well as the potential to interchange traffic with Canadian National at its north end and Canadian Pacific Limited at Stettler, Alberta. A viable work or undertaking existed even without regard to the existence of real or potential interchanges with the national railways. Although the facts of that case and this one are superficially similar, in that close to 100% of the grain traffic originating on the Canadian Western Railway flowed into export trade, the distinguishing feature is that the Canadian Western Railway line was not vital, integral or essential to the operation of Canadian National as a national railway subject to federal jurisdiction. With or without the existence of Central Western, traffic would continue to flow interprovincially over the Canadian National Railway system.

In contrast, the Wild Horse Mainline of NOVA is necessary for the physical operation of the Altamont Canada line. Without it, Altamont Canada would be bereft of its entire gas supply. Further, the measurement of the volume of gas entering its line would not be possible without the existence of NOVA's proposed Wild Horse Meter Station.

The Board has carefully considered the arguments of counsel for Altamont Canada that relate to the integration of the Wild Horse Mainline with the rest of the NOVA system. The Board points out that the correct test, as applied by the Supreme Court of Canada in the *Central Western* and other cases, is not whether the facilities in question are integral to an intraprovincial work but whether such facilities are vital, integral or essential to the federal work. Thus, once it is found that the NOVA Wild Horse Mainline is vital, integral or essential to the Altamont Canada line, federal jurisdiction results. The issue of the degree of integration of the NOVA Wild Horse Mainline with the rest of the NOVA system is not relevant to the determination of this jurisdictional question.[1] The only remaining distinctions between the NOVA Wild Horse Mainline and the Altamont Canada line are the distinctions relating to separate ownership and separate transportation contracts with shippers.

In the *Central Western* case, the Supreme Court said that a change in ownership was not significant, except to the extent that it resulted in a change in operations between two entities. In the Altamont Canada situation, separate ownership will not result in a substantial change of operation between the two entities. Indeed, without gas supply from and the operational support of NOVA, the Altamont Canada line would cease to function. Similarly, without the 300 m of pipe provided by Altamont Canada, the NOVA Wild Horse Mainline could not operate to fulfil its intended function as a pipeline. Thus, in our view, a necessary nexus exists between the Wild Horse Mainline of NOVA and the Altamont Canada line. The NOVA line is essential to and functionally integrated with the line of Altamont Canada.

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[1]This issue may be relevant to a determination of whether other portions of the NOVA system may be vital, integral or essential to a federal work. However, that is not the question being considered by the Board in the context of the GHW-1-92 proceeding.

The facts of this case also distinguish it from the *Cyanamid* case. In that case, the issue concerned a link at the downstream end of the interprovincial natural gas transport chain. The bypass pipeline in that case did not have an impact upon the movement of natural gas interprovincially, and was unnecessary for the functioning of the pipeline of TransCanada PipeLines. In this case, the link is at the upstream end and is necessary for the functioning of Altamont Canada. Unlike *Cyanamid*, that fact establishes a necessary nexus between the two pipelines and renders the NOVA line essential to the federal work.

An example of a case decided initially by this Board in which federal jurisdiction was found to have been properly asserted through the application of the "vital, integral or essential" test was *Dome Petroleum Ltd. v. National Energy Board*[1]. In that case, Mr. Justice Mahoney found that "there must be means of taking product from the line if the product in it is to move; without that there can be no transportation"[2] and that finding supported federal jurisdiction under the vital, integral or essential test. The Altamont Canada pipeline facility is similar in that, without the active agency of NOVA, it would be impossible to provide transportation services on the Altamont Canada line.

The need for two separate transportation arrangements--one with each of NOVA and Altamont Canada--to transport gas on the combined pipeline arises incidentally from the separate ownership of the two parts and does not alter the federal characterization of the pipeline. While the "linchpin" in the *AGT* case may have been the existence of bilateral contracts which enabled AGT customers to access telephone lines in other provinces without separate contracts, the lack of such unifying contracts, in this instance, should not mean lack of federal jurisdiction over two parts of a single work or undertaking. Given the overwhelming evidence of the integral operation and purpose of the NOVA Wild Horse Mainline and the Altamont Canada line, the Board views the existence of separate transportation contracts as not determinative.

4.4 Decision

For the reasons expressed in this decision, the Board answers the preliminary question of jurisdiction in the affirmative. The work, as currently proposed, comprising the Wild Horse Mainline and the Altamont Canada line, will be subject to federal jurisdiction because it is one work connecting the province of Alberta to the United States of America. Alternatively, the Wild Horse Mainline is so vital, integral and essential to the Altamont Canada line as to be part of the federal work.

The Board would add that Altamont Canada could apply to construct the entire pipeline from Princess to the international boundary. The separate construction, ownership and operation by Altamont Canada of just 300 m of pipeline seems to the Board to serve only two purposes: first, to apply for a minimum length of pipeline adjudged to be acceptable to the Board; and, second, to avoid federal jurisdiction over the 217 km pipeline from Princess to the connection with Altamont Canada, by attempting to create for the Wild Horse Mainline the appearance of an intraprovincial work. If the Board were to approve the Altamont Canada pipeline as

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[1](1987), 73 N.R. 135 (F.C.A.)
[2]Ibid., at p. 139

applied for, it could be said to be lending its support to a colourable attempt to avoid the consequences of the *Constitution Act, 1867* and the clear direction of Parliament, as set out in the *National Energy Board Act*, for the Board to regulate federal pipelines.

The Board has taken careful account of Altamont Canada's position that the Board's consideration of this matter does not accord with the requirements of fundamental justice and the Board's past practices. The Board does not share the view that it has been, in any sense, unfair. With respect to all matters which it considers, the Board is keenly aware that it is bound to consider the specific application before it and to afford all parties the right to be heard. Accordingly, the Board has restricted itself to an examination of Altamont Canada's application, which includes, in the Board's view, an examination of the Wild Horse Mainline and has provided all parties full opportunity to present their cases.

It is not appropriate or relevant to assess this application on any other basis, such as on the basis of what the Board decided with respect to the compression facilities applied for by Alberta Natural Gas Company Ltd[1] or on the basis of past decisions of the Board. Nor is it necessary to examine the balance of the NOVA system which will continue to function as a natural gas transportation system regardless of whether the Altamont Canada line and the Wild Horse Mainline are ever built.

Finally, the Board is cognizant of the following comments of Madame Justice Reed in *Alberta Government Telephones v. C.R.T.C.*,[2] which were ultimately implicitly affirmed by the Supreme Court of Canada and cited with approval by Mr. Justice Mahoney in *Dome* [at p. 138]:

> ... the fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters' rights.

Accordingly, the lack of any prior assertion of regulatory authority or, in fact, the improper exercise of jurisdiction over a period of time, does not mean that there is a bar to a finding that the Board has jurisdiction in the appropriate fact situation.

The finding of the Board that the pipeline to be constructed south of Princess to the international boundary is a single work precludes the grant of an exemption order by the Board pursuant to paragraph 58(1)(a) of the *National Energy Board Act.* The resulting pipeline would exceed the forty kilometre limitation prescribed by that Act. Accordingly, the exemption order application filed by Altamont Canada is dismissed because of a lack of authority under paragraph 58(1)(a) to grant the application. Other relief may be sought under the appropriate provisions of the *National Energy Board Act* in accordance with this decision.

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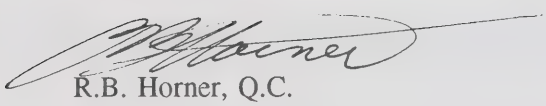
[1]GHW-2-91 Reasons for Decision in the matter of Alberta Natural Gas Company Ltd Application for Facilities, May 1992.
[2][1985] 2 F.C. 472 at p. 488

Disposition

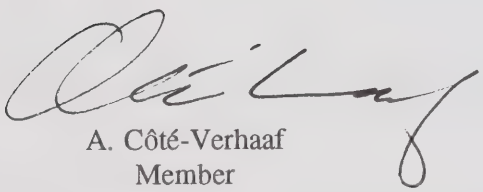
The foregoing chapters constitute our Decision and Reasons for Decision on this application and on the preliminary question of jurisdiction raised by this application.

R. Priddle
Chairman

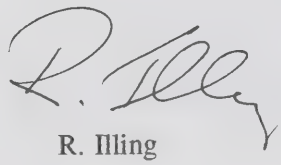


R.B. Horner, Q.C.
Member

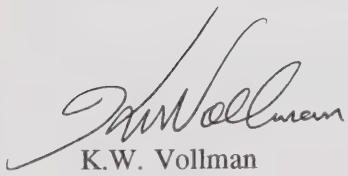
A.B. Gilmour
Member



A. Côté-Verhaaf
Member



R. Illing
Member



K.W. Vollman
Member

R.L. Andrew
Member

Dissent

6.1 Dissenting Opinion of J.-G. Fredette

I have read my colleagues' decision and find that I am unable to agree with their reasons and conclusions. There are two fundamental issues on which my views differ.

The first issue relates to the Board's decision to raise a preliminary question of jurisdiction with respect to Altamont Gas Transmission Canada Limited's ("Altamont Canada's") application to the Board pursuant to section 58 of the *National Energy Board Act* ("the Act"). I should note at this point that I was not present when the Board made its initial decision to raise the preliminary question of jurisdiction and that my dissent was recorded when the Board subsequently approved the Directions on Procedure which governed these proceedings.

The second issue relates to my colleagues' reasons and conclusions with respect to the constitutional character of NOVA Corporation of Alberta's ("NOVA's") proposed Wild Horse Mainline.

I will discuss each of these issues in turn; however, before proceeding with that discussion, I think it would be useful to briefly examine what I have termed "the Canadian natural gas network".

6.1.1 The Canadian Natural Gas Network

I recognize that the Altamont Canada application contemplates a specific work; however, in order to put the applied-for pipeline into proper perspective, I consider it essential to examine the proposed pipeline in the context of the overall Canadian natural gas network.

The Canadian natural gas network is huge and complex, made up of tens of thousands of kilometres of gathering, transmission and distribution pipelines. The network stretches from Vancouver Island in the west to Québec City and Lac St-Jean in the east. If one were to stand in Québec City at the eastern end of the Canadian network, one could visualize many distinct pipelines - some federally regulated, others provincially regulated - all connected to one another in order to deliver and receive gas and carry out their functions as integrated intraprovincial gathering and transmission systems, integrated interprovincial gathering and transmission pipelines, long interprovincial/international transmission pipelines, short interprovincial/international border links and integrated intraprovincial distribution systems.

These pipelines are in a sense all necessary to each other and dependent upon one another. For example, without integrated intraprovincial gathering and transmission lines such as those of NOVA and TransGas Limited, there would be no gas to feed into the interprovincial/ international transmission system operated by TransCanada PipeLines Limited ("TransCanada PipeLines"). In this way, pipelines are analogous to railways. On this point, I think the words of Dickson, C. J. in the *United Transportation Union et al. v. Central Western Railway*

Corporation [1] ("*Central Western*") case are instructive. Beginning on page 1128 of that decision, Dickson, C. J. discussed the significance of a physical connection between a federal and local rail line for determining the constitutional character of the local line. On page 1129, he stated:

> Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act, 1867*. Furthermore, if the physical connection between rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines.

The question is: In constitutional terms, where within the labyrinth of pipelines comprising the Canadian natural gas network do the proposed Wild Horse Mainline and Altamont Canada line fit?

6.1.2 Preliminary Question of Jurisdiction

On 26 July 1991, Altamont Canada applied to the Board pursuant to section 58 of the Act for an order granting it exemption from the provisions of sections 30, 31 and 33 of the Act. The applied-for facilities would run 300 metres north from the Canada-U.S. border, with a block valve at the upstream end as depicted in Figure 1-1.[2] In its 8 May 1992 letter to the Board, Altamont Canada explained that a meter station on the Altamont Canada line would be redundant in view of plans by NOVA to construct a meter station immediately upstream of the Altamont Canada line and of plans of Altamont (U.S.) to construct one immediately downstream. However, Altamont Canada indicated its willingness to own and operate its own meter station if required by the Board "for jurisdictional reasons".

In section 2 of the Act, pipeline is defined as follows:

> "pipeline means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, inter-station systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;"

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[1] [1990] 3 S.C.R. 1112.

[2] Figure 1-1 appears on page 3 of these Reasons for Decision.

Paragraph 58(1)(a) of the Act provides:

> 58.(1) The Board may make orders exempting
>
> > (a) Pipelines or branches of or extensions to pipelines, not exceeding in any case 40 kilometres in length from any or all of the provisions of sections 29 to 33, and 47.

In my view, the applied-for pipeline is clearly a pipeline within the meaning of section 2 and, being less than 40 kilometres in length, falls within the ambit of section 58. In the light of these facts, it is not surprising that Altamont Canada applied to the Board under section 58 to construct the proposed line. As Altamont Canada correctly stated in its 27 July 1992 submission to the Board, "the application of section 58 to the Altamont Canada application is the same regardless of who claims jurisdiction over NOVA's Wild Horse Mainline".

Altamont Canada pointed out in its submission that the Board has previously approved the construction of and currently regulates a number of short pipelines which act as "bridges" between pipelines regulated by other authorities. Altamont Canada provided the Board with a list of seventeen bridge gas pipelines which the Board approved and currently regulates.[1] Altamont Canada submitted that:

> The Altamont Project was designed to respect the established practices and policies of Alberta and federal authorities. Altamont Canada bridges the Alberta border in the same way that other federally-regulated pipelines, such as TCPL or ANG, bridge the Alberta border and the St. Clair bridges the border to Ontario.

The St. Clair pipeline was among the Board approved bridge pipelines that Altamont Canada referred to in its submission. St. Clair Pipe Lines Ltd. ("St. Clair"), a wholly owned subsidiary of Unicorp Canada Limited, was incorporated, among other things, to construct under federal jurisdiction the St. Clair pipeline. St. Clair applied to the Board in 1988 for authorization to construct the line. The proposed line was to be 700 metres long and run from its point of interconnection on the international border with the facilities of the Michigan Consolidated Gas Company to a point of interconnection with Union Gas Limited[2] ("Union"). St. Clair's application to the Board did not contemplate any valves or measurement facilities along the proposed line. The Union facilities that St. Clair was to connect with were not in existence when St. Clair made application to the Board. Union would be required to build a new 12-kilometre pipeline, the St. Clair-Bickford Line, to connect the St. Clair line to its existing Sarnia Industrial line. Union's St. Clair-Bickford Line would include valving as well as check measurement and control facilities at a proposed new station at the point where the new link intersected the existing Sarnia Industrial line.

The Board approved the construction of the St. Clair line and currently regulates that line. The Ontario Energy Board approved the St. Clair-Bickford line and currently regulates that line.

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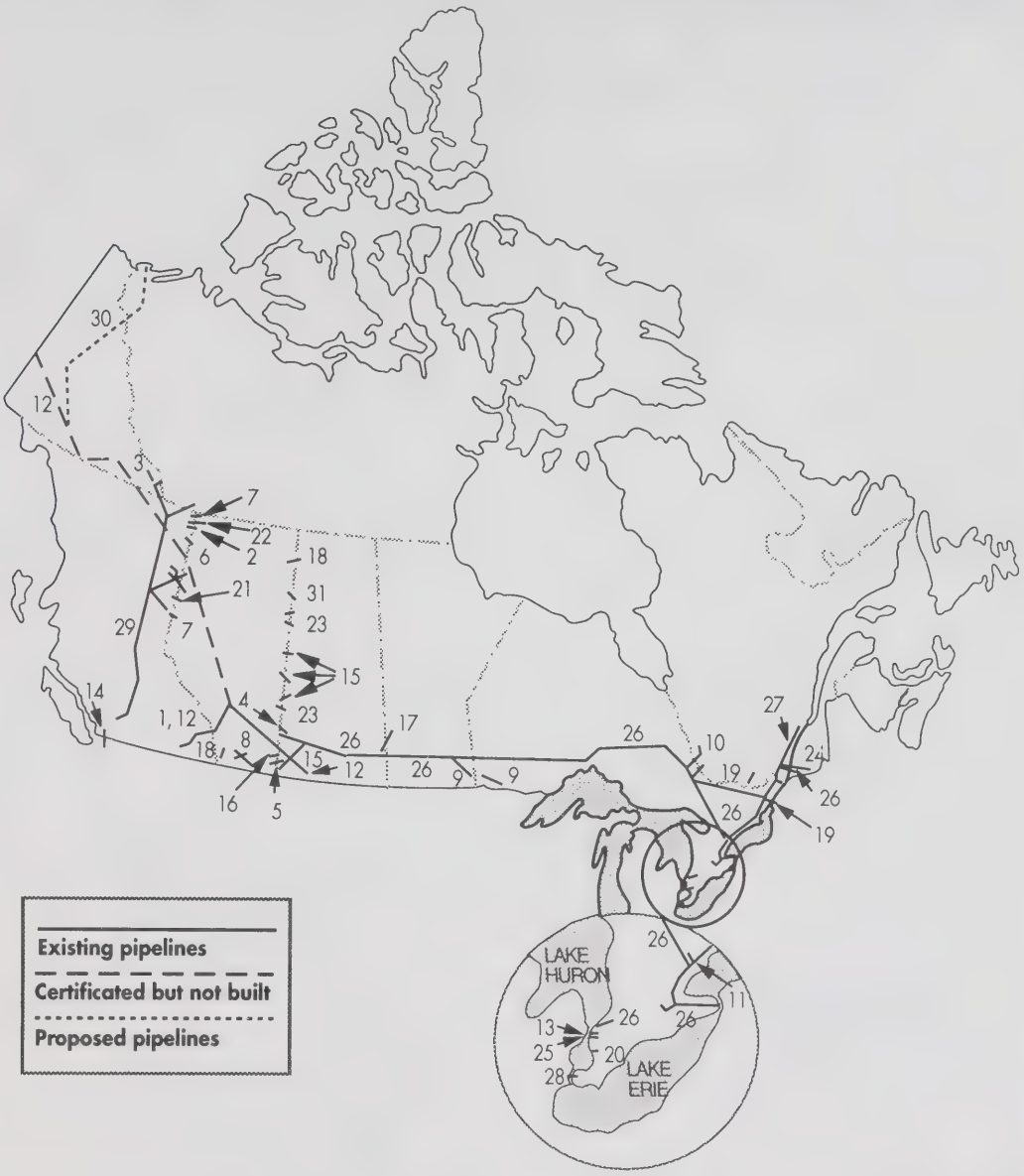
[1]Figures 6-1 and 6-2 show and list the pipelines under the Board's jurisdiction.

[2]Union is a local distribution company located in southern Ontario which is regulated by the Ontario Energy Board and was at the time of the St. Clair application a wholly owned subsidiary of Unicorp Canada Limited.

Figure 6 - 1
Gas Pipeline Companies
Regulated by the National Energy Board



1. Alberta Natural Gas Company Ltd
2. Amerada Hess Canada Ltd.
3. Amoco Canada Petroleum Company Ltd. (inactive)
4. Amoco Canada Resources Limited (inactive)
5. Bow Valley Industries Ltd.
6. B.P. Resources Canada Limited
7. Canadian Hunter Exploration Ltd.
8. Canadian-Montana Pipe Line Company
9. Centra Transmission Holdings Inc.
10. Champion Pipe Line Corporation Limited
11. Consumers' Gas (Canada) Limited
12. Foothills Pipe Lines Ltd.
13. Genesis Pipeline Canada Ltd.
14. Huntingdon International Pipeline Corporation
15. Many Islands Pipe Lines (Canada) Limited
16. Mid-Continent Pipelines Limited
17. Minell Pipeline Ltd.
18. Murphy Oil Company Ltd.
19. Niagara Gas Transmission Limited
    (a) Ottawa River crossing
    (b) St. Lawrence River crossing
20. Novacorp International Pipelines Ltd. (certified but not built)
21. Peace River Transmission Company Limited
22. Petrorep (Canada) Ltd.
23. Poco Petroleums Ltd.
24. SCL Quebec Pipeline Inc.
25. St. Clair Pipelines Ltd.
26. TransCanada PipeLines Limited
27. Trans Québec and Maritimes Pipeline Inc.
28. Union Gas Limited
29. Westcoast Energy Inc.
*30. Foothills Dempster Lateral (Corridor)
31. 167496 Canada Ltd.

* = *Proposed*

Figure 6 - 2
Oil and Oil Products Pipeline Companies Regulated by the National Energy Board

1. Aurora Pipe Line Company
2. Cochin Pipe Lines Ltd.
3. Dome Kerrobert Pipeline Ltd. and Pan Canadian Kerrobert Ltd.
4. Dome NGL Pipeline Ltd.
5. Dome NGL Pipeline Ltd. and Amoco Canada Petroleum Company Ltd.
6. Esso Resources Canada Limited
7. Husky Border Pipelines Ltd.
8. Interprovincial Pipe Line Inc.
9. Interprovincial Pipe Line (NW) Ltd.
10. Manito Pipelines Ltd.
11. Montreal Pipe Line Limited
12. Mont Resources Limited
13. Murphy Oil Company Ltd.
14. Northwest Transmission Company Limited
15. Petroleum Transmission Company
16. Pouce Coupe Pipe Line Ltd.
17. Shell Canada Products Limited
18. Sun Pipe Line Company
19. Trans Mountain Pipe Line Company Ltd.
20. Trans-Northern Pipelines Inc.
21. Wascana Pipe Line Ltd.
22. Westspur Pipe Line Company (1985) Inc.
23. Windsor Storage Facility Joint Venture
24. Yukon Pipelines Limited

The Ontario Energy Board determined, notwithstanding the objection of TransCanada PipeLines, that the St. Clair-Bickford line was under provincial jurisdiction. TransCanada PipeLines sought leave to appeal the OEB's decision. The National Energy Board, in hearing St. Clair's application, had declined to deal with the jurisdictional issue TransCanada PipeLines had raised because at that point, the OEB had ruled on the matter and TransCanada PipeLines was seeking leave to appeal. The Ontario Divisional Court dismissed TransCanada PipeLines' application for leave to appeal. The Court provided brief reasons by way of written endorsement on the record. The Court stated that the reasoning of the Supreme Court of Canada in *Kootenay and Elk Railway Company* v. *Burlington Northern Inc.* [1] ("*Kootenay*") was dispositive of the issue. I will have more to say with respect to the *Kootenay* decision later in these views.

The Board has never raised a question with respect to the constitutional classification of the St. Clair-Bickford Line.

The similarities between the St. Clair pipeline and the proposed Altamont Canada line are both numerous and obvious. I will not list them here. Moreover, the St. Clair line is fairly typical of the bridge pipelines which the Board has approved and regulates.

In my view, the fact that the Board has a long standing policy with respect to bridge pipelines provides a satisfactory explanation as to why Altamont Canada configured its proposed pipeline in the way it did. However, if a further rationale is needed to justify the configuration, it can be found in the fact that the Altamont Canada/Altamont (U.S.) pipeline project is competing with the Alberta Natural Gas Company Ltd ("ANG")/Pacific Gas Transmission Company/Pacific Gas & Electric Company expansion project ("the ANG Project") to deliver Canadian gas to California markets. Both projects require an increase in capacity on the upstream NOVA system, and both projects have been configured to minimize overall costs of transportation by taking advantage of NOVA's single toll at a postage stamp rate. Under postage stamp rates, a shipper pays a set toll calculated exclusively on a volumetric basis regardless of the distance its gas is shipped. For example, a shipper who contracts with NOVA to ship a volume of gas the short distance from Caroline, in west-central Alberta to NOVA's point of interconnect with the ANG system, just inside the Alberta border near the Municipality of Crowsnest Pass, would pay the same toll as a shipper who contracts with NOVA for the transportation of the same volume of gas from Rainbow Lake in north-west Alberta to this same delivery point. By maximizing the use of NOVA facilities to transport gas within Alberta, both the ANG and Altamont Canada projects have sought to maximize their competitiveness. If the proposed Wild Horse Mainline were determined to be a federal work and not part of NOVA's system, and a separate toll charged for transportation service on it, the Altamont Project would be disadvantaged vis-à-vis its competition.

In my view, the fact that the Board has previously approved and currently regulates a number of bridge pipelines like the one proposed by Altamont Canada, coupled with the fact that there is a valid commercial reason for the way in which Altamont Canada configured its pipeline, provide a complete explanation as to why the proposed Altamont Canada facilities and the NOVA Wild Horse Mainline were configured as they were. While the value of the Board's

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[1] [1974] S.C.R. 955.

past decisions on bridge pipelines as legal precedents may be arguable, these decisions exist and have guided applicants contemplating the construction of bridge pipelines. In the light of these circumstances, my colleagues' conclusion that the proposed Altamont Canada facilities were designed to "avoid federal jurisdiction" and "represent a colourable attempt to avoid the consequences of the *Constitution Act, 1867* and the clear direction of Parliament as set out in the *National Energy Board Act*" appear to me to be untenable and unfounded.

Notwithstanding these circumstances, the Board chose to raise a preliminary question of jurisdiction with respect to Altamont Canada's application. That preliminary question has culminated in these Reasons for Decision and the denial of Altamont Canada's application. The application was denied because the majority concluded that the two pipelines to be constructed between Princess, Alberta and the United States, as currently contemplated, would be subject to federal jurisdiction because they would constitute one work connecting the province of Alberta and the United States of America. In its reasons, the majority also stated that even if their characterization of the NOVA and Altamont Canada lines as a single extraprovincial work is incorrect, they found NOVA's Wild Horse Mainline to be so closely connected with or central to the Altamont Canada line as to cause the proposed Wild Horse Mainline to lose its character as a provincial work and become, together with the Altamont Canada pipeline, one pipeline subject to federal jurisdiction.

In my view, the preliminary question of jurisdiction need not have been asked in the first instance. NOVA is a company established and operated pursuant to the laws of the province of Alberta. There can be no doubt that the Energy Resources Conservation Board ("the ERCB"), the provincial body charged with regulating, *inter alia*, the construction of new facilities on the NOVA system, has authority to approve the construction of the Wild Horse Mainline. In *Kootenay*, the Kootenay & Elk Railway Company ("Kootenay") proposed constructing a rail line wholly situated within British Columbia, which was to terminate ¼ inch north of the Canada-U.S. border. On the south side of the border, Burlington Northern Inc., proposed constructing a rail line which would terminate ¼ inch south of the Canada-U.S. border, immediately adjacent to the end of the Kootenay line. A question arose as to whether Kootenay's proposed line was part of an undertaking extending beyond the province of British Columbia, and that in consequence, Kootenay's incorporation was *ultra vires* of the British Columbia legislature. The matter found its way to the Supreme Court of Canada where Martland, J. wrote the majority decision. In answer to the third question raised in the cross-appeal: "Did the Canadian Transport Commission err in law when it failed to find that the Kootenay and Elk Railway Company was part of an extraprovincial undertaking?", at page 982, Martland, J. concluded as follows:

> In summary, my opinion is that a provincial legislature can authorize the construction of a railway line wholly situated within its provincial boundaries. The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial legislature to create it.
>
> In my opinion, the third question on the cross-appeal should be answered in the negative.

To my mind, in the present case, the Board is dealing with a situation not unlike that presented in the *Kootenay* case. In particular, both *Kootenay* and the present case required a determination of the constitutional character of works yet to be constructed. This is in contrast to virtually all the leading cases in this area of the law, the vast majority of which have required the courts to determine the constitutional character of existing facilities. In those cases, in reaching their decisions, the courts have had the benefit of being able to examine operating works.

In *Kootenay*, the Supreme Court of Canada, while recognizing the possibility that when constructed the Kootenay line might fall within federal jurisdiction, refrained from making an advance ruling on this issue and clearly said that the Commission was not compelled in law to raise the question. The Court limited itself to the matter that was before it: whether the British Columbia provincial legislature could authorize the construction of a railway line wholly situated within British Columbia's boundaries.

It seems to me that in considering Altamont Canada's application, the Board would have been well advised to adopt an approach similar to that adopted by the Supreme Court of Canada in *Kootenay*. In fact, I think that the reasons for not making an advance ruling in this case are even more compelling than those that existed in the *Kootenay* case. In *Kootenay*, the Canadian Transport Commission had before it three applications, each of which related to facilities which would clearly be within the Commission's jurisdiction. In the present case, the Board had only the application of Altamont Canada before it. It therefore had to reach beyond Altamont Canada's application to examine the impugned NOVA facilities. In my view, this fact provides an even stronger case than existed in *Kootenay* for administrative restraint on the Board's part.

Before leaving the issue of the preliminary question, I would note that, as described in Altamont Canada's original application to the Board, the Altamont Canada facilities were to have connected with an extension of the NOVA system originating at Empress, Alberta. This NOVA line was to have been in service in November 1993. On 31 July 1992, the Board learned that NOVA had decided to construct a different line to connect with Altamont Canada's line. This new line, the Wild Horse Mainline, would originate at Princess, Alberta, pass through producing areas in the south-eastern part of Alberta and cross several existing NOVA lines. It was also planned to be in service in November 1993 but on 30 July 1992, NOVA agreed to a request by Altamont to delay its Altamont-related expansion by one year and ceased work until such time as it is advised by Altamont of its intention to proceed. NOVA has yet to apply to the ERCB for approval to construct any of the facilities on its system required to transport gas to the Altamont Project, including the Wild Horse Mainline.

My point in reciting the foregoing is to show that while the Altamont Canada matter has been before the Board, the NOVA facilities have gone through a change in routing and a change of in-service date. In a sense, my colleagues have attributed constitutional character to a non-operating work still in gestation.

For the foregoing reasons, it is my view that rather than asking a preliminary question of jurisdiction, it would have been preferable to have done as was suggested by the Supreme Court of Canada in *Kootenay* and determine, when interconnection occurred (or at a minimum, when NOVA applies to the ERCB), whether the NOVA line fell within federal jurisdiction. In

my view, to do otherwise amounts to making an advance ruling based on assumed facts, something I am of the view the Board should avoid.

6.1.3 The Constitutional Character of NOVA's Wild Horse Mainline

Notwithstanding my view that the preliminary question should not have been asked in the first instance, the question was asked and my colleagues' reasons address the constitutional issues raised. I will therefore address those same issues.

6.1.3.1 The Tests for Constitutional Character

The constitutional character of Altamont Canada's line is not an issue in this case. It was because Altamont Canada recognized the Board's jurisdiction to regulate extraprovincial pipelines that it applied to the Board for approval to construct its proposed line. No one has challenged the Board's authority to regulate that line.

The question raised by the Board is: What is the constitutional character of the proposed Wild Horse Mainline? Is it a facility falling within federal jurisdiction by virtue of either of the tests set out in *Central Western* or is it, as part of NOVA's integrated system, within provincial jurisdiction?

The NOVA integrated system is a province-wide natural gas transportation system which includes main trunk lines and laterals of approximately 17,700 kilometres, 44 compressor stations and other related facilities. NOVA receives gas at 819 receipt points and transports it to 134 delivery points, all of which are located within Alberta. One hundred and twenty-six of these delivery points serve the intra-Alberta market and the balance, as Figure 6-3 illustrates, are at points where the NOVA system interconnects with interprovincial and international pipelines.[1] It should be noted that at no point does the NOVA system cross or even reach Alberta's borders.

The tests for federal jurisdiction set out in *Central Western* have been termed by the majority to be the "physical connection test" and "the vital, integral or essential test". Although I am of the view that the first of these tests would be more aptly described as the "extraprovincial work or undertaking test", I will adopt my colleagues' nomenclature to avoid confusion.

6.1.3.2 The Physical Connection Test

As I understand it, the first test requires a determination of whether the putative provincial work or undertaking is itself extraprovincial in character and therefore within the legislative authority of the Parliament of Canada.

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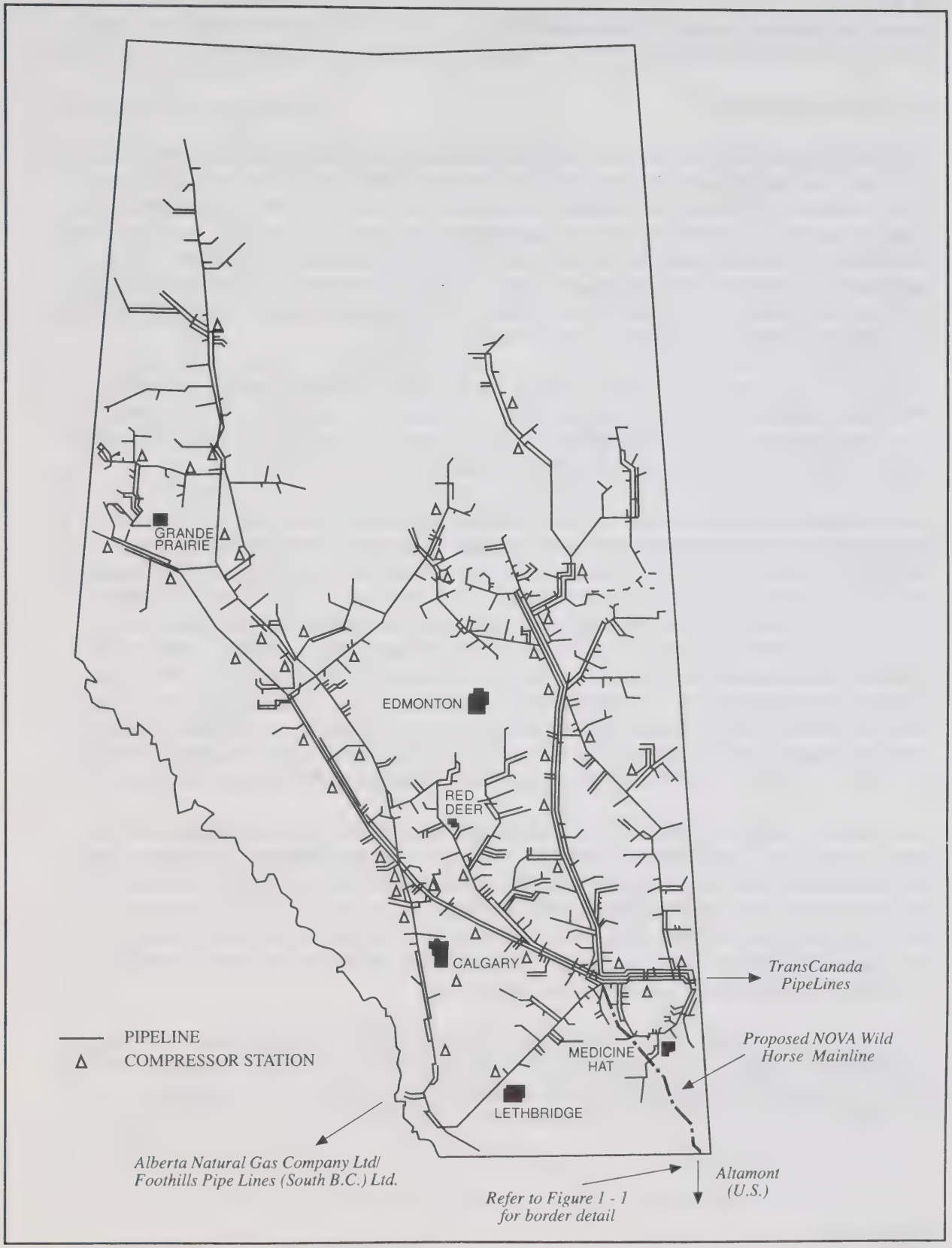
[1] 1992 Annual NOVA Plan, page 9, as referenced by the Alberta Petroleum Marketing Commission on page 5 of its 13 August 1992 submission to the Board.

Figure 6 - 3
NOVA Corporation of Alberta
System Facilities Map



In applying the first test in *Central Western*, Dickson, C.J. examined both the physical connection between the Central Western Railway and CN, and the ownership and operation of Central Western *vis-à-vis* CN.

(1) Physical Connection

After reviewing the relevant case law, Dickson, C.J. made the statement which I have reproduced on the first page of my views. The essence of Dickson, C.J.'s comments is that provincial and federal railways in Canada necessarily form a network and therefore purely local railways touch, directly or indirectly, upon federal railways. Dickson, C.J. concluded that that fact alone cannot be sufficient to turn a local railway into an interprovincial work or undertaking. If this were not the case, it would be difficult to envision any rail line that could be provincial in nature. Dickson, C.J. concluded by discounting the significance to be attached to the physical connection between Central Western and CN.

What is to be made of the connection between the proposed Altamont Canada line and the Wild Horse Mainline? It is the nature of pipelines that they must physically connect, pipe on pipe. As I described above, the Canadian natural gas network is made up of tens of thousands of kilometres of pipelines, all of which are interconnected.

In *B.C. Electric Railway Company* v. *Canadian National Railway Company* [1] ("*B.C. Electric Railway*"), the putative section of provincial rail line under consideration connected two federally regulated lines and was only one mile long. In discussing the *B.C. Electric Railway* case in his *Canadian Western* decision, Dickson, C.J. pointed out: "In light of this relatively short length, it might be thought possible to see the rail line as being merely a link in the chain of a larger extraprovincial network; yet, it was held to be under provincial jurisdiction". Dickson, C.J. then noted that the Central Western line was 105 miles long, which he concluded made it more difficult than was the case in *B.C. Electric Railway*, to regard Central Western's line as no more than a fully integrated part of CN's operation. Dickson, C.J. then went on to note that whereas there was no mention of any physical separation of the lines in *B.C. Electric Railway*, there was a 4-inch gap between the Central Western and CN lines.

Looking at the proposed 217-kilometre Wild Horse Mainline, in terms of physical length, it is more in the nature of the Central Western line than the one mile section of rail considered in *B.C. Electric Railway*. In any event, both the Central Western line and the B.C. Electric line were found to be within provincial jurisdiction. Moreover, in both *Central Western* and *B.C. Electric Railway* and in several other cases involving physical connections between a provincial and federal work, the courts have given little weight to the existence of a physical connection in making their constitutional determinations.

There obviously will be no 4-inch gap between the NOVA Wild Horse Mainline and Altamont Canada's line. Unlike railways, pipelines physically cannot have such gaps. However, should the laws of physics be determinative of constitutional character when for all practical purposes Central Western's and CN's lines were physically joined? I would think not. The fact that a

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[1] [1932] S.C.R. 161.

4-inch gap existed in the *Central Western* case but no such gap exists in the present case is, in my view, immaterial.

In my view, the physical connection between NOVA and Altamont Canada is of marginal significance in determining the Wild Horse Mainline's constitutional character.

(2) Ownership and Operation

In *Central Western*, Dickson, C.J. also considered the questions of ownership and operation of the railway for purposes of the physical connection test. Ownership was of particular significance in *Central Western* because Central Western had previously been owned and operated by CN. In the Federal Court of Appeal's decision in *Central Western*, Marceau, J.'s finding that Central Western fell within federal jurisdiction was, in part, based on his view that the operation of the rail line had not changed subsequent to its sale to Central Western and the mere fact of new ownership did not affect the question of jurisdiction.

In the present case, there is no corporate relationship at any level between the sponsors of the Altamont Canada line and NOVA.

In *Central Western*, in support of the contention that there existed a significant operational connection between Central Western and CN, reference was made to the facts that Central Western is connected only with CN and that virtually all of its freight is ultimately forwarded on CN. The fact that there were various contractual arrangements between Central Western and CN was referred to as further evidence that there was a significant operational connection between Central Western and CN.

Dickson, C.J. found some merit in these arguments, however, he concluded that the factors were illustrative of a close commercial relationship between the two railways as opposed to showing that CN operated Central Western. Dickson, C.J. referred to the facts that the daily control of the business of the rail line and the distribution of grain cars along the rail line are dealt with by Central Western. Dickson, C.J. concluded on the basis of these facts that "CN exercises no control over the running of the rail line, making it difficult to view Central Western as a federal work or undertaking".

Looking now at the proposed Wild Horse Mainline, it is clear that NOVA will have daily control over its operation. NOVA will determine what the line's specifications will be. NOVA will decide when and precisely where the Wild Horse Mainline will be built and who will build it. The transport of gas over the line will be pursuant to contracts between NOVA and various shippers and will be governed by NOVA's tariff. NOVA will own, operate and in every respect control the Wild Horse Mainline without aid or interference from Altamont Canada.

In conclusion, I think it is clear that a simple physical connection between federal and provincial facilities is insufficient to bring the provincial facilities within the federal domain. There must be some additional element or elements. In *Central Western*, Dickson, C.J. examined the ownership and operation of the two lines in question to see if that additional element existed. In the present case, I have done likewise. Ownership is not an issue in this case. That leaves operation. Based on the independent manner in which NOVA will operate the Wild Horse Mainline, I am drawn inescapably to the view that, along with Altamont

Canada's proposed line, the Wild Horse Mainline will not form a single extraprovincial work. While the NOVA and Altamont Canada lines will undoubtedly be mutually beneficial to their respective owners, each of them is part of a larger and distinct enterprise. In NOVA's case, that enterprise consists of the transportation of gas within the province of Alberta. In Altamont Canada's case, the enterprise involves the export from Canada of gas, ultimately for consumption in California.

In their reasons, my colleagues refer to *Luscar Collieries* v. *MacDonald* [1] ("*Luscar*") and *Alberta Government Telephones* v. *Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications* [2] ("*AGT*").

In *Luscar*, the Privy Council was called upon to determine whether a short branch railway in Alberta which was owned by Luscar but which was operated by CN pursuant to agreements with Luscar, was a railway "within the legislative authority of The Parliament of Canada". The Privy Council held that "having regard to the way in which the railway is operated" it was in fact a railway which connected Alberta with other provinces and therefore fell within federal jurisdiction. At page 90 of its decision, the Privy Council stated:

> If under the agreements hereinbefore mentioned the CNR should cease to operate the Luscar branch, the question whether under such altered circumstances the railway ceases to be within [federal jurisdiction] may have to be determined, but that question does not now arise.

The suggestion that may be gleaned from the above quoted passages of the Privy Council's decision is that the fact that the CNR operated the Luscar line was the decisive factor in its determination that the line was part of the CNR. In the present case, the NOVA Wild Horse Mainline will be in every respect operated by NOVA and not Altamont Canada.

In the *AGT* case, the Supreme Court of Canada dealt with the issue of whether AGT, a provincial telecommunications enterprise, fell within federal jurisdiction due to its relationship with Telecom Canada, a federal undertaking. In finding that AGT's undertaking should be federally regulated, the Court stated:

> ... AGT's role in relationship with Telecom Canada is relevant to the decision on AGT's own constitutional character. The facts are unequivocal that AGT is the mechanism through which the residents of Alberta send and receive interprovincial and international telecommunications services. The services are provided through both corporate and physical arrangements which are marked by a high degree of cooperation.
>
> One essential vehicle employed by AGT to interprovincialize and internationalize its services is the Telecom Canada organization. It is a form of joint venture and is a necessary feature of AGT's overall undertaking. ... AGT could not separate itself from Telecom Canada

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[1] [1927] 4 D.L.R. 85 (P.C.).

[2] [1989] 2 S.C.R. 225.

without significantly altering the fundamental nature of AGT's enterprise.

AGT's relationship with Telecom Canada also illustrates the role AGT plays in the provision of telecommunications services to Canadians as a whole. The national telephone system exists in its present form largely as a result of the Telecom Canada arrangement. AGT is a cooperative partner in this national system and this reinforces the conclusion that AGT is not operating a wholly local enterprise.

The evidence adduced in the *AGT* case indicated that AGT offered its Alberta customers telecommunications services which extended beyond the borders of the province.

In the present case, NOVA is not a joint venture or partner with Altamont Canada, nor is Altamont Canada a necessary feature of NOVA's overall undertaking. The affected NOVA facilities could be separated from Altamont Canada without significantly altering the nature of NOVA's own undertaking. The proposed service is not marked by a degree of cooperation higher than that which exists between any connecting natural gas pipelines. Each shipper must arrange independently for the transportation of its gas with each pipeline. Finally, unlike AGT, NOVA does not offer its customers any service which extends beyond the borders of the province.

Before concluding this section of my views, I feel obliged to comment on one aspect of the views expressed by the majority regarding the physical connection test. The majority found as a matter of fact that it was proposed that the construction of both the NOVA and Altamont Canada lines would be coordinated. From this it concluded that "one complete pipeline spanning the distance between Princess, Alberta and the territory of the United States of America will be constructed". It would seem that the majority's conclusion hinged primarily on the fact the construction of the two lines would be coordinated. In my mind, there are many examples of coordination of construction between federal and provincial works. Obvious examples are provincial highways leading to federal airports and interprovincial bridges. The fact of coordination is simply a reflection of sound planning and efficient project management practice and in my view should not be used as a test for determining constitutional character. Moreover, the Board when approving facilities which are destined to connect with provincial, federal or U.S. pipelines expects that the applicant will undertake to coordinate its construction activity with the connecting pipeline(s) and may condition its certificate to that effect. Otherwise the economic feasibility and usefulness of the Board-approved facilities could be affected.

6.1.3.3 The Vital, Integral or Essential Test

The vital, integral or essential test is the second of the two tests for federal jurisdiction set out in *Central Western*. As Dickson, C.J. stated in *Central Western*, under this test "jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking". However, the vital, integral or essential test is not a test which may be uniformly applied to all fact situations for a neat solution. As Dickson, C.J. stated in *AGT* at p. 258:

> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this Court's decision in *Northern Telecom, 1980, supra.* Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed ....

Although no definitive tests can be formulated, in *Northern Telecom Ltd.* v. *Communications Workers of Canada et al* [1] ("*Northern Telecom No. 1*"), Dickson, C.J. set out the following guiding principles:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exception or casual factors; otherwise, the constitution could not be applied with any degree of continuity and regularity. (emphasis added)

Northern Telecom No. 1, like *Central Western*, was a case which dealt with federal jurisdiction over labour relations. However, in reaching its decision in *Central Western*, the Supreme

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[1] [1980] 1 S.C.R. 115.

Court looked at the relationship between two works: a provincial railway and a federal railway. In the present case, the Board has decided to make a determination with respect to two works: a provincial pipeline and a federal pipeline. In my view, the principles set out in *Northern Telecom No. 1* and reiterated in *Central Western* are equally applicable to the present case.

(1) The Altamont Canada Line

The first step in applying the *Northern Telecom No. 1* approach is to identify the core federal work in relation to which a provincial work might be seen as integral.

Altamont Canada's proposed 300-metre line is the only federal work at issue in this case. It will connect at its southern end with a 998-kilometre pipeline which Altamont (U.S.) has proposed building. The Altamont (U.S.) pipeline will run from its point of interconnection with Altamont Canada at the Canada-U.S. border to a point near Opal, Wyoming, where it will connect with the existing Kern River pipeline. The Altamont Project, as these two pipelines have been described, will provide Canadian natural gas producers with a means of accessing western U.S. markets, particularly southern California markets. That is the sole reason for the project's existence. At its most northern end, the Altamont Project will connect with the NOVA pipeline system in southern Alberta. It was understood between Altamont Canada and NOVA that NOVA was prepared to create a new border delivery point near Wild Horse, Alberta pursuant to NOVA's usual procedures for responding to customer requests for service.

The Altamont Canada and Altamont (U.S.) lines will have a common operator, Altamont Service Corporation. Coordination of pipeline design, construction and operation between NOVA and the Altamont Project will be in accordance with the usual and established practices in the industry where upstream and downstream pipelines interconnect to permit the flow of gas from the field to the market. Finally, shippers wanting service on the Altamont Canada line will have to enter into contracts for that service.

(2) The Wild Horse Mainline

As part of NOVA's integrated system, the Wild Horse Mainline will serve an entirely different function than the two Altamont lines.

The purpose of the Wild Horse Mainline is no different than the purpose served by other NOVA facilities; that is, to transmit and transport Alberta-produced natural gas from receipt points in Alberta to delivery points in Alberta and out of the NOVA pipeline system. The Wild Horse Mainline, if constructed, will form part of NOVA's intraprovincial gathering, transmission and distribution system in the same way as facilities costing $75 million which will have to be added to NOVA upstream of the Wild Horse Mainline to permit gas to move over NOVA's system to Princess for ultimate delivery to Altamont Canada. The fact that facilities must be added upstream of the Wild Horse Mainline is in my view cogent evidence of the fact that the Wild Horse Mainline will form an integrated part of NOVA's system. The need for the facilities upstream of Princess and the extension from Princess were occasioned by service requests to move gas from numerous receipt points within Alberta to a new delivery point within Alberta.

Further evidence that the Wild Horse Mainline will form part of NOVA's integrated system can be found in the fact that the line crosses existing NOVA laterals in the Medicine Hat area to which it could be connected in the future. In other words, the Wild Horse Mainline is not simply a line extending 217 kilometres from Princess to the Altamont Canada interconnect but a normal extension of NOVA as an intraprovincial going concern.

(3) Functional Integration

In *Central Western*, Dickson, C.J. stated that: "If work occurs simultaneously between the two enterprises functional integration may exist". He found that Central Western was responsible for taking empty grain cars to the various elevators, filling them with grain and then transporting them to the Ferlow Junction where they were transported to CN locomotives. Only when the grain cars were transferred did the two companies coordinate their work. On this basis, Dickson, C.J. found that: "The transfer can thus be seen as a connection at the end of the local transportation process, unlike in *Northern Telecom No. 1* where the service provided by Northern Telecom took place simultaneously with the service provided by Bell". Dickson, C.J. also noted that whereas in *Northern Telecom No. 1*, the Northern Telecom workers had to be on Bell premises on a daily basis, such was not the case on the Central Western Railway where CN employees and trains only entered upon Central Western's property in order to transfer grain cars to and from Ferlow Junction.

Looking now to the relationship between the NOVA Wild Horse Mainline and Altamont Canada, NOVA will receive and transport gas within Alberta and deliver it to Altamont Canada at the point of interconnection between the NOVA system and Altamont Canada. In my view, this delivery must be characterized as a mere connection at the end of the local transportation process. NOVA and Altamont Canada will not be working "side by side". NOVA will be carrying out its function as an intraprovincial gatherer and transporter of gas while Altamont Canada will be fulfilling its role as part of the Altamont Project. The relationship between NOVA and Altamont Canada can best be described as linear rather than coterminous.

In contrasting the facts in *Northern Telecom No. 1* and *Northern Telecom Ltd.* v. *Communications Workers of Canada et al* [1] ("*Northern Telecom No. 2*") to the facts in *Central Western*, Dickson, C.J. noted that the employees in the Northern Telecom cases were located in five different provinces and suggested that that fact would advance the conclusion that their work was integral to an interprovincial work or undertaking. He then noted that Central Western's employees were located wholly within Alberta and in the normal course of their affairs would have no occasion to travel beyond that province in a working capacity.

Like Central Western's employees, NOVA's pipeline employees are located within Alberta and in the normal course of their affairs would not have occasion to travel beyond the province in a working capacity. Unlike Northern Telecom's employees who worked on Bell's equipment at various Bell facilities, NOVA's pipeline employees will not work on any Altamont equipment or facilities, either inside or outside Alberta.

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[1] [1983] 1 D.L.R. (3d) 1 (S.C.C.).

In finding the Central Western Railway to be a provincial work and undertaking, Dickson, C.J. stated, at page 1146 of his judgment: "Indeed, the circumstances surrounding Central Western provide an even stronger case for provincial control than is evident in the pipeline example,[1] it being entirely possible for [Central Western] to conduct other business along its railway". (emphasis added)

In the present case, there is evidence that NOVA could conduct business, other than the transmission of gas to Altamont Canada, along the Wild Horse Mainline. In the course of this proceeding, Altamont Canada submitted to the Board a letter which Roan Resources Inc. ("Roan") had written to NOVA. In its letter Roan indicated that it had reviewed ERCB records relating to gas reserves and determined that in excess of 100 Bcf of shut-in reserves exist along the proposed Wild Horse route. Roan stated that it currently has shut-in reserves located within a close distance to the pipeline corridor proposed by NOVA that are not economic to tie-in given NOVA's current configuration. Roan indicated that these wells could be hooked up if the proposed Wild Horse Mainline project were to proceed. Roan was also of the view that there is additional reserve potential in the area which could be developed if the proposed line were constructed. Typically the presence of a pipeline through or near an area with gas producing potential has acted as a catalyst for resource development.

While not conclusive, the fact that "there is not merely a possibility" but a likelihood that NOVA will be able to conduct "other business" along the Wild Horse Mainline strongly suggests to me that the Wild Horse Mainline will be part of NOVA's integrated system and should fall within the provincial domain.

In *Central Western*, Dickson, C.J. also considered CN's dependence on the Central Western Railway. He found that it could not be said that CN was in any way dependent on the services of Central Western. He made this finding on the basis that since 1963 CN had consistently wanted to abandon the Central Western line. Dickson, C.J. concluded that CN would not be seriously disadvantaged if Central Western's employees failed to perform their usual tasks.

It is obvious that without the Wild Horse Mainline, Altamont Canada's line could not function. It is also obvious for that matter that without a substantial part of NOVA's integrated system upstream of Princess, Altamont Canada's line could not function. In fact, without NOVA's integrated system, several other interprovincial and/or international pipelines (eg. TransCanada PipeLines and ANG) also could not function as they do today. Indeed, if one wishes to go even further upstream, it could be argued that without gas processing plants and gas wells, there would be no supply for extraprovincial pipelines and that those facilities are therefore vital and integral to the extraprovincial carriers. The question of course must be: Where does one reasonably draw the line between federal and provincial jurisdiction?

In my view, the line should be drawn in this instance in the same place it has been drawn with respect to all other extraprovincial carriers which connect with NOVA's system. These points of connection reflect the distinct functions which NOVA and the extraprovincial carriers perform. The desirability of splitting these two functions was recognized by the Borden Royal Commission which was established to recommend policies which would serve the national

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[1]This reference was to the Cyanamid case, *Re National Energy Board* [1988] 2 F.C. 196.

interest concerning, among other things, the efficient operation of interprovincial and international pipelines.

In its comments, the Borden Commission recognized the utility of having the provinces regulate the intraprovincial transportation of oil and gas. The Commission stated:

> 31. The Commission is not unmindful that in regulating interprovincial gas and oil pipeline companies questions with respect to the jurisdiction of the Parliament of Canada *vis-à-vis* the jurisdiction of the respective provincial legislatures may arise.
>
> So long as the provinces of Canada concerned have made provision for proper measures of conservation and orderly production within their respective boundaries, and administer them on a sound basis, the Commission believes that it should be possible for the Parliament of Canada through the Board of Transport Commissioners, to limit the exercise of its jurisdiction over gas and oil pipelines so that it will not extend into fields which can adequately be dealt with by provincial regulation and control. Specifically, the Commission does not believe that the Board of Transport Commissioners need exercise jurisdiction over gathering systems connected to interprovincial systems. However, we realize that, if such jurisdiction rightly belongs to the Parliament of Canada, it may in the future be necessary for the Board to exercise it in order to ensure that its regulatory authority will be effective. The important consideration is that if the consumer of oil or gas in Canada is to receive the benefit of a reasonable price, field prices in the respective provinces and transmission charges must remain reasonable.
>
> Certain of the provinces of Canada have already enacted legislation and established administrative machinery for dealing with conservation and production. So long as provincial legislation and administrative machinery does not impede the effectiveness of the regulatory authority of the Parliament of Canada over interprovincial and international oil and gas pipeline companies, the Commission believes that the exercise of the jurisdiction of the Parliament of Canada can be limited accordingly.[1]

For over 100 years, Canadian courts have been required to decide cases in which litigants have argued for provincial or federal jurisdiction over a variety of works and undertakings. The common thread running through the various tests which the courts have employed in these cases to determine constitutional character is the preservation of federal authority over matters with an inherently federal aspect. The courts have sought to protect federal works and undertakings from being "sterilized" by the operation of provincial laws. Similarly, they have sought to ensure that federal interests in such things as railways, pipelines and telecommunications were not prejudiced by, for example, provincial labour disputes. In my view, it was this need to safeguard federal authority over federal matters that Dickson, C.J.

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[1]First Report, October 1958.

was referring to in *Northern Telecom No. 1* when he stated that, although Parliament does not generally have jurisdiction over labour relations, it may assert jurisdiction where "such jurisdiction is an integral part of its primary competence over some other single federal subject".

It will be of surprise to no one who has read these views on the application of the vital, integral or essential test that it is my opinion the line between federal and provincial jurisdiction in the present case should be drawn at the proposed NOVA Wild Horse Mainline and Altamont Canada interconnect point. I have applied the criteria which Dickson, C.J. applied in *Central Western* to determine whether it could be said that the Wild Horse Mainline was functionally integrated with the Altamont Canada line, if the two lines were constructed as currently contemplated. I concluded that, as was the case in *Central Western*, the Wild Horse Mainline, as part of NOVA's integrated system, would carry out a purely local function which can be distinguished from the extraprovincial function which the Altamont Canada line would carry out. In *Central Western* Dickson, C.J. found that the fact that it was "entirely possible" for Central Western to conduct other business along its railway assisted him in finding provincial jurisdiction. I have found that there is a strong likelihood that NOVA will be able to conduct business other than the transport of gas to its point of interconnection with Altamont Canada along the Wild Horse Mainline. Both of these findings, while not determinative of the issue, assist me in finding that the Wild Horse Mainline, if constructed, would properly fall within provincial jurisdiction.

The final criterion Dickson, C.J. examined in *Central Western* was dependence. That is, was CN dependent on the Central Western Railway? Dickson, C.J. concluded that CN was not so dependent and this, in part, led him to conclude that the two lines were not functionally integrated. In my view, the Altamont Canada line is physically dependent on the Wild Horse Mainline; however, it is also my view that there can be instances in which a federal work is physically dependent upon a provincial work but not functionally integrated with the work for jurisdictional purposes. I think the Altamont Canada/NOVA configuration presents just such a case. In my view, a finding that a federal work is physically dependent on a provincial work should not put an end to the constitutional inquiry. In conducting our constitutional inquiry, we should always keep in the forefront of our minds the rationale behind the various constitutional tests. We must ask ourselves: Will some federal head of power be impeded or frustrated if the putative provincial work in question remains in the provincial domain? What federal head of power will be frustrated if the Board were to exercise jurisdiction over only the Altamont Canada line? I can think of none. For that reason, I am of the view that there is no reason for departing from the jurisdictional treatment which has historically been afforded NOVA's lines of interconnection with extraprovincial carriers. In my view, it is not necessary for the Board to have jurisdiction over all of the pipeline stretching between Princess and the NOVA/Altamont Canada interconnect. By this I mean that such jurisdiction is not an integral part of the Board's primary competence over Altamont Canada. It must be remembered that the Wild Horse Mainline cannot be operated in isolation from the remainder of NOVA's system. Therefore, in my view, federal interests would not be advanced by merely taking jurisdiction over the Wild Horse Mainline. In practical terms, the Board is in an equally good position to protect federal interests if it asserts jurisdiction over the Altamont Canada line as opposed to the entire length of pipeline between Princess and U.S.-Canada border. It does not need anything more. A Princess to the Canada-U.S. border line under federal jurisdiction would have, as we have seen, the same general characteristics as the Altamont-Canada line alone - except that it would be longer. I do not believe length has ever been a determining

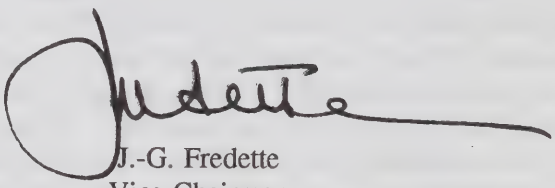
factor in constitutional classification or that it has ever been found that a federal work was too short or too small in itself to be worthy of federal jurisdiction.

I stated above that the jurisdictional line could be drawn at this location without impairing the federal government's ability to regulate matters in which it has an inherent interest. Pursuant to Part III of its Act, the Board could approve the construction of the Altamont Canada line and attach any conditions to that approval that it viewed as appropriate. Similarly, the Board would have sole jurisdiction to consider additions to, and any diversion, relocation or sale of, the Altamont Canada line. Pursuant to Part IV of the Act, the Board would have sole authority to determine just and reasonable tolls for the Altamont Canada line and would have exclusive jurisdiction to determine all tariff matters, including conditions of access. Finally, pursuant to Part VI of the Act the Board has jurisdiction (subject to Governor in Council approval) to issue licences for the export of the gas which would be transported on the Altamont-Canada line. In the extreme, if the Board decided that it was not in the public interest for the Altamont-Canada line to operate, it has the requisite authority to give effect to such a decision.

Therefore, as I stated above, I can conceive of no way in which any matter within the federal domain could be prejudiced by the configuration of the pipeline proposed by Altamont Canada. If there is something which is offensive to federal interests in the proposed configuration of the Altamont Canada/NOVA lines, I have not had the perspicacity to see it.

Disposition

For all of the foregoing reasons, I dissent from the majority's Disposition.



J.-G. Fredette
Vice Chairman

6.2 Dissenting Opinion of C. Bélanger

I did not agree with the majority's decision to raise the preliminary question of jurisdiction and I also am unable to agree with the majority's reasons and conclusions on the question. In my opinion, the jurisdictional question raised by the Board in respect of the NOVA Wild Horse Mainline is premature and the answer given by my colleagues is incorrect. My views on these two issues coincide with those expressed by Mr. Fredette in his dissenting opinion and I will not repeat the points he raised in detail here.

Suffice it to say, that with respect to the constitutional classification of the NOVA Wild Horse Mainline, I am not persuaded by the importance given by my colleagues in their application of

the "physical connection test" to the fact that construction activities on the NOVA Wild Horse Mainline and Altamont Canada pipeline will be coordinated. Nor am I persuaded by the importance they attribute to the dependence which exists between the two lines in applying the "vital, integral or essential test".

With respect to the first test, in my opinion, the NOVA Wild Horse Mainline is not itself an extraprovincial work. Wholly situated within the province of Alberta, the range of its business activities is spatially limited to receiving and delivering gas within Alberta as a part of the larger NOVA system. Its ownership and operation are distinct from the Altamont Canada line. While it is physically connected to the Altamont Canada line, this fact is not sufficient to turn it into a federally regulated pipeline. If it were, all provincial pipelines touching directly or indirectly upon extraprovincial pipelines, which is a frequent occurrence in Canada's pipeline network, would attract federal jurisdiction and the division of powers over works and undertakings would thus be undermined. My colleagues place significant emphasis on the fact that the NOVA Wild Horse Mainline's construction would be coordinated with Altamont Canada's as evidence that the two pipelines constitute one work. This coordination is a reflection of good business planning and practices by two works in a mutually beneficial relationship and nothing more. If viewed as anything more, then it would be difficult to envision a pipeline that could be provincial given the need for collaborative effort among the various pipelines constituting Canada's pipeline network unless, of course, it operated outside the network.

With respect to the second test, again, the NOVA Wild Horse Mainline is distinct from the Altamont Canada line by virtue of its ownership, operation and the nature of the services it provides its shippers. It is obvious that the two lines will physically depend upon each other to fulfil their respective purposes. In the circumstances of this case, this fact is simply a manifestation of an existential imperative and not of functional integration *per se*. The relationship between the NOVA Wild Horse Mainline and the Altamont Canada pipeline is no different from that which typically exists between any two connecting pipelines; that is, one delivers gas to the other, an activity which requires coordination and cooperation.

Disposition

For the foregoing reasons, I dissent from the majority's Disposition.

C. Bélanger
Member